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In The

# Supreme Court of the United States

October Term, 1994

ALSTON R. KEENER,

*Petitioner,*

v.

EXXON COMPANY, USA, and EXXON CORPORATION,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where a petroleum franchisor alleges, as an affirmative defense under the Petroleum Marketing Practices Act (PMPA), to have offered its franchisee a right of first refusal of a third party's bid to purchase the franchisee's "leased marketing premises," must the franchisor prove that the property offered to the franchisee was identical to that covered by the bid, a question as to which the courts of appeals are in conflict?

2. By judicially engrafting onto the PMPA a "strong presumption" of petroleum franchisor compliance, did the Fourth Circuit panel majority impermissibly reverse the express statutory presumption of franchisor noncompliance?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i

TABLE OF AUTHORITIES ..... iv

OPINIONS BELOW ..... 1

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED ..... 2

STATUTORY PROVISIONS INVOLVED ..... 3

STATEMENT ..... 4

Factual History ..... 4

Procedural History ..... 7

REASONS FOR GRANTING THE WRIT ..... 12

I. The Fourth Circuit's "Strong Presumption" That A Right Of First Refusal Is Extended Anytime The Offering Prices Are The Same Creates A Circuit Split ..... 14

II. The "Strong Presumption" Of Oil Company Compliance With The PMPA That The Fourth Circuit Judicially Engrafted Onto The Statute Contradicts Congress's Express And Directly Opposite Presumption Of Oil Company Noncompliance ..... 19

CONCLUSION ..... 25

APPENDIX

*Keener v. Exxon Co., USA*, 32 F.3d 127 (CA4 1994) .... 1a

*Keener v. Exxon Co., U.S.A.*, Civil No. 92-0095-C (D. Md. Dec. 17, 1993) ..... 17a

TABLE OF CONTENTS – Continued

Page

Order Entered by the United States Court of Appeals for the Fourth Circuit Denying Keener's Petition for Rehearing and Suggestion for Rehearing *En Banc* ..... 25a

List of Other Statutes in Which Congress Utilized Phrase "Right of First Refusal" ..... 27a

## TABLE OF AUTHORITIES

Page

CASES

*Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 870 F.2d 93 (CA2 1989) (per curiam) ..... 15

*Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 699 F. Supp. 27 (E.D.N.Y. 1988) .....15, 16

*Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473 (N.D. Ill. 1985) ..... 16

*Brach v. Amoco Oil Co.*, 677 F.2d 1213 (CA7 1982) ...23, 24

*Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (CA1 1991) .....19, 20

*Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251 (1994) ..... 19

*Ellis v. Mobil Oil*, 969 F.2d 784 (CA9 1992) ..... 15

*Ellis v. Mobil Oil Corp.*, 708 F. Supp. 1094 (Ariz. 1989) ..... 15

*Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (CA10 1987) .... 20

*FDIC v. Meyer*, 114 S. Ct. 996 (1994) ..... 17

*Hilo v. Exxon Corp.*, 997 F.2d 641 (CA9 1993) ..... 23

*Keener v. Exxon Co., USA*, 32 F.3d 127 (CA4 1994) ..... 2, 9-12, 14-16, 20, 22

*Mobil Oil Corp. v. Baliko*, 192 A.D.2d 450, 597 N.Y.S.2d 15 (1st Dep't 1993) (mem.)..... 16

*Pantry Pride Enters., Inc. v. Stop & Shop Cos.*, 806 F.2d 1227 (CA4 1986) ..... 22

TABLE OF AUTHORITIES – Continued

Page

*Slatky v. Amoco Oil Co.*, 830 F.2d 476 (CA3 1987) (in banc) ..... 22, 23

*Vance v. Terrazas*, 444 U.S. 252 (1980) ..... 19

STATUTES

12 U.S.C. §2219a ..... 17

15 U.S.C. §§2801-2806 ..... 3

15 U.S.C. §2801(1)(B)(ii)(I) ..... 5

15 U.S.C. §2802(b) ..... 21

15 U.S.C. §2802(b)(3)(D)(iii) ..... 3, 6, 7, 13, 16, 21

15 U.S.C. §2805(c) ..... 3, 10, 13, 14, 19-21, 24

16 U.S.C. §460x-11(e)(3) ..... 18

20 U.S.C. §1132f-7(d) ..... 18

28 U.S.C. §1254(1) ..... 2

28 U.S.C. §1331 ..... 8

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990) ..... 17

Lorin M. Kleeger, Comment, *Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity*, 32 Emory L.J. 273 (1983) ..... 24

S. Rep. No. 731, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 873 ..... 20

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Alston R. Keener respectfully prays that a writ of certiorari issue to review the judgment and opinion that the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 15, 1994.

## OPINIONS BELOW

The Fourth Circuit's opinion, which affirmed the district court's grant of summary judgment dismissing Keener's claim against respondents (collectively "Exxon") under the Petroleum Marketing Practices Act (PMPA), and the dissenting opinion of Judge Murnaghan

are reported, *see Keener v. Exxon Co., USA*, 32 F.3d 127 (1994), and are reprinted in the appendix, *see* App. to Pet. for Cert. 1a-16a.

Keener filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. On September 23, 1994, the Fourth Circuit entered an order denying the petition for rehearing by a 2-1 vote and denying the suggestion for rehearing *en banc* by a 7-3 vote, with three judges not participating. The order denying Keener's petition for rehearing and suggestion for rehearing *en banc* has not been reported. It is reprinted in the appendix. *See* App. to Pet. for Cert. 25a-26a.

The opinion and order of the United States District Court for the District of Maryland granting Exxon's motion for summary judgment are not reported. The texts of the opinion and order are reprinted in the appendix. *See id.* 17a-24a.

## GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. §1254(1).

The Fourth Circuit entered its judgment on August 15, 1994. Thereafter, Keener filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. On September 23, 1994, the Fourth Circuit entered an order denying Keener's petition for rehearing and suggestion for rehearing *en banc*.

## STATUTORY PROVISIONS INVOLVED

This case requires consideration of two provisions contained in Title I of the Petroleum Marketing Practices Act, 92 Stat. 322, 15 U.S.C. §§2801-2806.

Section 102(b)(3)(D) of the PMPA provides in pertinent part that a petroleum franchisor that has determined "in good faith and in the normal course of business" to sell a service station may refuse to renew the franchise relationship pertaining to the station so long as:

> "(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either –
>
> "(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or
>
> "(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. §2802(b)(3)(D)(iii).

Section 105(c) of the PMPA allocates the burdens applicable to an action arising under the PMPA:

> "In any action under subsection (a) of this section, the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title, and, if applicable, that such franchisor complied with the requirements of section 2802(d) of this title." 15 U.S.C. §2805(c).

## STATEMENT

### Factual History

In 1986, respondent Exxon built a service station on land it owned in Morgantown, West Virginia. Soon thereafter, petitioner Alston R. Keener entered into a franchise agreement with Exxon to operate the station, known as the Sabraton station.

The franchise agreement permitted Keener to purchase Exxon-brand gasoline from Exxon for resale to consumers at the station, which Keener leased from Exxon. Keener developed the station into a remarkably successful business that sold two million gallons of Exxon gasoline annually.

Exxon has several methods of distribution for its gasoline. One method involves Exxon's sale of gasoline to its franchised retail dealers, such as Keener. Another method involves Exxon's sale of gasoline to its franchised distributors, who resell the gasoline at wholesale to dealers and, in some instances, at retail to consumers.

In 1991, Exxon decided to auction off its best West Virginia stations to its distributors. Under its plan, Exxon hoped to obtain the best sale prices for its "key site" stations while retaining sufficient control over them to ensure that they would continue to sell Exxon-brand gasoline for at least twenty-one years. Exxon determined that the Sabraton station was a "long-term keeper," Exxon's highest classification of "key site." An appraisal completed for Exxon on July 13, 1991, estimated the station's fair market value to be $370,000.

On July 30, 1991, Exxon decided to sell the Sabraton station, with a gasoline supply commitment, to a distributor for not less than $547,000. *See* Fourth Circuit Appendix ("CA4 App.") 17. Under the PMPA, a commitment to supply refiner-trademarked gasoline is a franchise. *See* 15 U.S.C. §2801(1)(B)(ii)(I).

On August 29, 1991, Exxon solicited bids on the Sabraton station from six Exxon distributors, including Joe DeFazio Oil Company (DeFazio). Exxon informed the distributors that it demanded a twenty-one year option to repurchase the property.

On September 26, 1991, Exxon notified Keener that his franchise relationship with Exxon would not be renewed. The notice informed Keener that he would be given the opportunity to purchase the station, but that his right to purchase gasoline from Exxon would terminate.

On October 23, 1991, DeFazio bid $1,200,010. The bid was to remain open until February 20, 1992. *See* CA4 App. 18, 20-26.

On December 17, 1991, Exxon notified Keener that someone had bid $1,200,010 to purchase the station. The notice, which purported to offer a right of first refusal on the bid, informed Keener that he did not have to grant Exxon a repurchase option. The notice did not disclose, however, that by matching the bid Keener would receive only part of the package of items that was the subject of the bid. DeFazio's bid was for an Exxon-branded station and the right to purchase its gasoline requirements from Exxon at favorable "rack" prices, which Exxon offers to its distributors even when, as here, they purchase as retailers. Had Keener matched DeFazio's bid, Keener

would have received an unbranded station and a refusal by Exxon to sell him gasoline at any price.

Keener did not believe that Exxon's offer constituted a valid right of first refusal under section 102(b)(3)(D)(iii)(II) of the PMPA. *See* 15 U.S.C. §2802(b)(3)(D)(iii)(II). Because the PMPA entitled Keener to receive either a valid right of first refusal or a "bona fide offer to sell," *see id.* §2802(b)(3)(D)(iii), Keener asked Exxon to sell him the Sabraton station at its fair market value. Exxon refused, and Keener declined to purchase the station for $1.2 million.

Exxon's offer to Keener expired on February 15, 1992. Five days later, DeFazio's bid expired without acceptance by Exxon.

On June 30, 1992, Exxon authorized DeFazio to display the Exxon trademark at the Sabraton station "pending [DeFazio's] purchase . . . of the property. . . . " CA4 App. 42. At a date unknown to Keener, Exxon committed to supply DeFazio with approximately 1.7 million gallons of gasoline per year to meet the station's requirements. *See id.* 521-22. On July 13, 1992, Exxon offered to sell the station to DeFazio. *See id.* 138. The price for this entire package was $1,200,010.

On July 21, 1992, DeFazio accepted Exxon's offer of the station, the trademark, and the gasoline commitment, *i.e.*, the leased marketing premises and a PMPA franchise to operate it. *See id.* 144. In effect, DeFazio paid Exxon $1.2 million for a package consisting of Exxon's station and Keener's franchise. Of the $1.2 million received for the package, Exxon allocated all of the proceeds to the station.

**Procedural History**

On October 1, 1992, Keener filed a complaint in the Circuit Court of Monongalia County, West Virginia. The complaint alleged that Exxon had violated the PMPA by unlawfully refusing to renew its franchise relationship with Keener.

Under the PMPA, when a franchisor decides to sell a franchised property and not to renew the franchise relationship, the franchisor must either: (1) make "a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises"; or (2) offer "the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises." 15 U.S.C. §2802(b)(3)(D)(iii).

Here, it is undisputed that Exxon did not make "a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises." *Id.* Accordingly, the sole question presented in Keener's suit against Exxon was whether Exxon extended to Keener a valid right of first refusal.

Keener's theory was that a valid PMPA right of first refusal requires the franchisor to offer to sell the leased marketing premises (*i.e.*, the gas station) to its franchisee at the same price offered by a third party for the premises. Here, Exxon offered Keener the right to pay the same price bid by DeFazio, but DeFazio's bid covered more than the leased marketing premises. In exchange for $1.2 million, DeFazio received the gas station, an Exxon franchise, and the right to purchase Exxon-brand gasoline at favorable "rack" rates. In exchange for the same price,

Keener would have received only the gas station; Keener would not have received an Exxon franchise or the right to purchase Exxon-brand gasoline at any price.

The defendants removed this suit to the United States District Court for the Northern District of West Virginia, which exercised subject matter jurisdiction pursuant to 28 U.S.C. §1331. Thereafter, the suit was transferred to the United States District Court for the District of Maryland.

After the time for discovery had expired, Exxon moved for summary judgment. Keener filed a cross-motion for partial summary judgment against Exxon on the question of liability. At that time, the district court permitted Keener to dismiss all defendants other than Exxon.

On December 17, 1993, the district court granted Exxon's motion for summary judgment and denied Keener's cross-motion. *See* App. to Pet. for Cert. 17a-24a. The district court concluded either that DeFazio's offer to Exxon and Exxon's offer to Keener did not have to be the same or that no reasonable jury could have concluded that they were different.

Believing the district court's ruling to be erroneous, Keener filed an appeal from the final judgment to the Fourth Circuit. On June 6, 1994, Keener's appeal was argued before Circuit Judges Murnaghan, Wilkinson, and Wilkins. In an opinion issued August 15, 1994, Judge Wilkinson, writing for himself and Judge Wilkins, affirmed the judgment of the district court. In explaining the basis for its affirmance, the panel majority wrote:

> "Keener's challenge rests on the assertion that the property Exxon offered him somehow differed

> from what DeFazio Oil had offered to buy. The fact that Exxon offered Keener the service station at the same price DeFazio Oil had bid, however, creates the strong presumption that Exxon fulfilled its right of first refusal obligation under §2802(b)(3)(D)(iii)(II). This presumption that a same price offer evidences statutory compliance reflects the recognition that claims such as Keener's intrude upon normal business operations once filed. Indeed, Keener's suit, by calling into question DeFazio Oil's continued operation of the station, can only have made it more difficult for DeFazio to manage its business affairs. Such a result, of course, is disruptive of the market efficiency the PMPA sought to maintain. Accordingly, early resolution of claims is of special significance in the PMPA context, and a presumption of statutory compliance where Exxon offered the same station for the same price facilitates that end. The presumption also comports with the desire not to transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions. *See Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 377 (4th Cir. 1992) (per curiam). It remains only to determine whether Keener has made a sufficient showing to create a triable issue of fact in the face of that presumption." *Keener v. Exxon Co., USA*, 32 F.3d 127, 131 (CA4 1994); App. to Pet. for Cert. 8a-9a.

In applying the "strong presumption" of statutory compliance that it had just created, the Fourth Circuit panel majority acknowledged that Keener had pointed to evidence in the record that what DeFazio purchased for $1.2 million differed from what Keener had been offered in exchange for the same price. *See* 32 F.3d at 131; App. to Pet. for Cert. 9a. Nevertheless, the "strength" of the panel majority's judge-made presumption proved sufficient to

overcome both Keener's evidence of Exxon's statutory noncompliance and Congress's express statutory presumption, found in section 105(c) of the PMPA, 15 U.S.C. §2805(c), of petroleum franchisor noncompliance with the PMPA.

Judge Murnaghan dissented. Recognizing that a right of first refusal requires *both* the price *and* the other terms and conditions of the offer to be the same, Judge Murnaghan began his dissenting opinion by writing: "The sole issue on appeal is whether the terms of Exxon's offer to Keener were identical to the terms of DeFazio Oil's offer to Exxon." *Keener*, 32 F.3d at 133; App. to Pet. for Cert. 13a (Murnaghan, J., dissenting).

Observing that "Exxon bears the burden of going forward with evidence to establish that the terms of the two offers were identical," 32 F.3d at 133; App. to Pet. for Cert. 14a, Judge Murnaghan wrote:

> "Under the terms of DeFazio Oil's offer to Exxon, DeFazio Oil gave Exxon (1) $1.2 million, and (2) an option to repurchase the service station if it ceased to be used to sell Exxon-brand motor fuel at any time in the next twenty-one years. Exxon gave DeFazio Oil (1) the station, (2) the right to display Exxon's trademark at the station, and (3) the right to purchase a sufficient supply of Exxon-brand motor fuel, at the relatively low 'rack' price, to meet the station's needs (*i.e.*, approximately 1.7 million gallons of fuel per year).
>
> "The terms of Exxon's offer to Keener were much simpler: Keener would have to have given Exxon $1.2 million and Exxon would had to have given Keener the station. Clearly, the express terms of the two offers were *not* identical. As an example, the promise

of a sufficient supply of Exxon-brand motor fuel at the 'rack' price was not to be given.

"Furthermore, Exxon has pointed to nothing in the record to suggest that the value of the repurchase option equalled the sum of the values of the trademark agreement and the gasoline supply commitment. Indeed, there is evidence to the contrary. Purchasing from an Exxon distributor (who would himself first purchase at the 'rack' price) instead of from Exxon itself is obviously less advantageous since some additional profit would be due to the distributor. Thus, the Court has no basis for holding that the two offers were equivalent, either in their express language *or* in their economic worth. Therefore, I would vacate the grant of summary judgment and remand the case to the district court." 32 F.3d at 133; App. to Pet. for Cert. 14a-15a (emphasis in original).

Judge Murnaghan turned next to the "strong presumption" of statutory compliance that the majority created to shift the statutory burden from franchisor to franchisee:

"The majority avoids [reversal of the district court's judgment] by creating out of whole cloth a 'strong presumption' that, whenever two offers contain the same purchase price, a valid right of first refusal has been extended – regardless of whether the same items were being purchased at that price. The majority's 'strong presumption' finds no support in the plain language of the PMPA or in the case law interpreting that statute. Furthermore, it makes no sense to presume that an offer to buy several valuable property interests (*e.g.*, a station plus the right to use a trademark plus the right to distribute a supply of fuel) and an offer to buy only one of those interests

(*e.g.*, a station) are 'identical' merely because the dollar amounts contained in the bids are the same. Moreover, the majority's creation of the 'strong presumption' could undermine the very purpose of the PMPA – to protect relatively weak local franchisees from the unfair business practices of powerful and sophisticated oil companies. *See Barnes v. Gulf Oil Corp.*, 824 F.2d 300, 306 (4th Cir. 1987) ('[The PMPA] was *designed* to benefit the small retailer. . . . ' (emphasis in the original)); *id.* at 305 ('As remedial legislation, the [PMPA] must be given a liberal construction consistent with its goal of protecting franchisees.' (citation and internal quotation marks omitted)). Therefore, I respectfully dissent." 32 F.3d at 133-34; App. to Pet. for Cert. 15a-16a (footnote omitted).

Keener thereafter filed a timely petition for rehearing containing a suggestion for rehearing *en banc*. In an order dated September 23, 1994, the panel denied Keener's petition for rehearing by a vote of 2-1, and the *en banc* court denied Keener's suggestion for rehearing *en banc* by a vote of 7-3, with three judges not participating. *See* App. to Pet. for Cert. 25a-26a. Circuit Judges Widener, Murnaghan, and Michael voted in favor of rehearing the case before the full court. *Id.* 26a.

## REASONS FOR GRANTING THE WRIT

In the Petroleum Marketing Practices Act, Congress allowed an oil company not to renew the franchise applicable to a service station that the oil company intended to sell provided that the oil company first made a bona fide offer to sell the station to its franchisee or offered the

franchisee a right of first refusal of a third party's offer to purchase. *See* 15 U.S.C. §2802(b)(3)(D)(iii). Congress also expressly provided that once a franchisee proves the nonrenewal of its franchise, the burden is upon the oil company to establish as an affirmative defense that nonrenewal was permitted under the PMPA. *Id.* §2805(c).

In this case, the Fourth Circuit ruled, in conflict with the Second and Ninth Circuits, that the PMPA's obligation to extend a right of first refusal is presumptively satisfied so long as the price term of the offer to sell the premises to the franchisee is the same as the price term contained in a third party's bid, even where, as here, the third party's bid covers items in addition to the premises.

The Fourth Circuit's ruling creates a conflict among the circuits as to what constitutes a valid PMPA right of first refusal, a question of utmost importance to the thousands of petroleum franchisees who, because of the PMPA's preemption provision, must rely heavily on the PMPA to shield them from the unfair business practices of powerful and sophisticated oil companies. Furthermore, the Fourth Circuit's unprincipled presumption threatens to wreak havoc in the twenty-six other instances where Congress has granted rights of first refusal to various private parties, to State and local governments, to the federal government, and to the Chief Justice of the United States.

This Court should also grant review because the Fourth Circuit panel majority has judicially engrafted onto the PMPA a presumption of oil company compliance despite Congress's clear and express statutory presumption of oil company noncompliance. *See* 15 U.S.C.

§2805(c). The Fourth Circuit panel majority's ruling that the PMPA must be construed to maximize ease of application and to minimize intrusion into the affairs of oil companies is contrary to the manner in which other federal courts of appeals have ruled that the PMPA must be understood and applied.

Because, in accordance with the intent of Congress, the PMPA must be construed to provide real and uniform protection to petroleum franchisees throughout the nation, the Court should grant this petition to resolve the circuit conflict as to what constitutes a valid "right of first refusal" and to overturn the Fourth Circuit's "strong presumption" of franchisor compliance, which directly contradicts the express presumption of franchisor noncompliance that Congress enacted in 15 U.S.C. §2805(c).

## I. The Fourth Circuit's "Strong Presumption" That A Right Of First Refusal Is Extended Anytime The Offering Prices Are The Same Creates A Circuit Split

In the decision below, the Fourth Circuit panel majority held: "The fact that Exxon offered Keener the service station at the same price DeFazio Oil had bid, however, creates the strong presumption that Exxon fulfilled its right of first refusal obligation under [15 U.S.C.] §2802(b)(3)(D)(iii)(II)." *Keener*, 32 F.3d at 131; App. to Pet. for Cert. 8a.

As a result of that "strong presumption," which no other court applying the PMPA has ever recognized, the Fourth Circuit panel majority was able to affirm the district court's grant of summary judgment in Exxon's favor

despite the fact that Keener had introduced evidence, as all three members of the Fourth Circuit panel acknowledged, *see* 32 F.3d at 131, 133; App. to Pet. for Cert. 9a, 14a-15a, showing that DeFazio's $1.2 million bid purchased items that Keener would not have received had he paid the same $1.2 million to Exxon.

The Fourth Circuit's ruling conflicts with the Ninth Circuit's ruling in *Ellis v. Mobil Oil*, 969 F.2d 784 (CA9 1992). In *Ellis*, the Ninth Circuit affirmed in relevant part a district court's ruling that "[a] right of first refusal requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the preemption *on terms identical to those the owner has received from another.*" *Ellis v. Mobil Oil Corp.*, 708 F. Supp. 1094, 1096 (Ariz. 1989) (emphasis added; internal quotations omitted).

The Ninth Circuit held in *Ellis* that where an oil company agrees to sell to a third party more than just the real property that was the subject of a franchise, the oil company is unable to employ the PMPA's right of first refusal provision. *Ellis*, 969 F.2d at 786. If Keener's case had arisen in the Ninth Circuit, that court, upon recognizing that DeFazio's offer covered more items than merely the premises that had been the subject of the franchise, would have concluded that Exxon failed to offer Keener a valid right of first refusal.

The Fourth Circuit's ruling also conflicts with that of the Second Circuit in *Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 870 F.2d 93 (CA2 1989) (per curiam), *aff'g* 699 F. Supp. 27 (E.D.N.Y. 1988). In the decision that the Second Circuit affirmed and adopted, the district

court ruled, construing 15 U.S.C. §2802(b)(3)(D)(iii)(II), that "[a] right of first refusal is a right to buy on the same terms offered by a third party." 699 F. Supp. at 31.

Thus, had Keener's case arisen in the Second Circuit, that court also would have held that Exxon did not afford him a right of first refusal under the PMPA, because the offer that DeFazio made to Exxon did not share the same terms as the offer that Exxon made to Keener.[1]

The "right of first refusal" guaranteed by the Second and Ninth Circuits, but not by the Fourth Circuit, is in accord with the ordinary meaning of the phrase "right of first refusal":

> "The holder of such a right has the option to purchase the grantor's real estate on the terms and conditions of sale contained in a bona fide offer by a third party to purchase such real estate, provided it is

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[1] The Fourth Circuit's ruling in *Keener* is also in conflict with the decisions of an Illinois federal district court and New York's intermediate appellate court. *See Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473, 475 (N.D. Ill. 1985) ("[t]he statute clearly requires Mobil to give plaintiff the right to *match* a third-party purchaser's offer") (emphasis in original); *Mobil Oil Corp. v. Baliko*, 192 A.D.2d 450, 450, 597 N.Y.S.2d 15, 16 (1st Dep't 1993) (mem.) (stating that oil company did not offer franchisee a valid PMPA right of first refusal where offer that oil company made to franchisee "added a term not present in the agreement between" the oil company and its prospective purchaser).

an offer that the grantor is otherwise willing to accept." Black's Law Dictionary 1325 (6th ed. 1990).[2]

While this case would be deserving of review even if its implications were limited to the PMPA, the Fourth Circuit's "strong presumption" of when a right of first refusal has been extended also threatens to erode the rights of first refusal that Congress provided in twenty-six other statutes to private parties, State and local governments, the federal government, and the Chief Justice of the United States.[3] In these statutes, Congress used the phrase "right of first refusal" to denote that the holder of the right is entitled not merely to the same price as a third party but also to purchase, in exchange for that price, the same items being purchased by the third party.

For example, in the Agricultural Credit Act of 1987, Congress expressly gave farmers a right of first refusal to purchase property that a financial institution acquired through foreclosure. *See* 12 U.S.C. §2219a. Section 2219a(b)(5)(A) of Title 12, United States Code, makes clear that a right of first refusal has two components: the purchase price, and the other terms and conditions of the sale. In order for a right of first refusal to be afforded under the Agricultural Credit Act, both components must be the same in both offers.

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[2] This Court has held that where Congress did not define a term used in a statute, the term must be construed "in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 114 S. Ct. 996, 1001 (1994).

[3] In the appendix, Keener sets forth citations to and synopses of each of these twenty-six statutes. *See* App. to Pet. for Cert. 27a-31a.

Similarly, in 16 U.S.C. §460x-11(e)(3), Congress gave the Secretary of the Interior "a right of first refusal to match any bona fide offer to obtain such interest [in a particular piece of scenic land] under the same terms and conditions as are contained in such offer." In 20 U.S.C. §1132f-7(d), entitled "Right of first refusal to [Student Loan Marketing] Association," Congress gave the Student Loan Marketing Association a right of first refusal to purchase common stock owned by the Secretary of Education in a particular corporation "on the same terms and conditions as such securities are to be offered to other persons."

Congress's use of the phrase "right of first refusal" in these statutes, and in the others cited in the appendix, proves that Congress intended that *both* the price *and* the other terms and conditions of sale offered to the holder of the right be the same as the price and the other terms and conditions offered by or to a third party.

The Fourth Circuit's plainly incorrect construction of the phrase "right of first refusal" as employed in the PMPA, in conflict with the decisions of the Second and Ninth Circuits, will undermine not only the important protection granted to petroleum franchisees under that statute but will also undermine application of the twenty-six other statutory provisions in which Congress provided rights of first refusal. For these reasons, the Court should grant this petition for a writ of certiorari.

## II. The "Strong Presumption" Of Oil Company Compliance With The PMPA That The Fourth Circuit Judicially Engrafted Onto The Statute Contradicts Congress's Express And Directly Opposite Presumption Of Oil Company Noncompliance

In Section 105(c) of the PMPA, Congress provided that a franchisee such as Keener need only show that his franchise was not renewed in order to establish a prima facie case that the oil company franchisor violated the PMPA. *See* 15 U.S.C. §2805(c). Once the franchisee has established a prima facie case, the burden shifts to the oil company "to establish as an affirmative defense that such termination or nonrenewal was permitted under section 2802(b) or 2803 of this title. . . . " *Id.*[4]

As the First Circuit explained in *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1991):

> "Under the enforcement provision of the Act, a franchisee may maintain a civil action against a franchisor who fails to comply with the requirements of section 2802 or 2803. 15 U.S.C. §2805(a). '[I]n order to establish a claim under the PMPA, the plaintiffs must prove as a threshold matter a termination or nonrenewal of their franchise relationship within the meaning of the PMPA. 15 U.S.C. §2805(c).' *Ackley v. Gulf Oil Corp.*, 726 F. Supp. 353, 359 (D. Conn.) (granting defendants' motions for summary judgment

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[4] This Court has recognized as "well established" the rule that an affirmative defense is to be "pleaded and proved by the party attempting to rely on it . . . . " *Vance v. Terrazas*, 444 U.S. 252, 269 n.11 (1980); *see also Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 2255 (1994) ("The only time the burden of proof – as opposed to the burden to produce evidence – might shift is in the case of affirmative defenses.").

> because valid assignment did not constitute termination or nonrenewal of franchise), *aff'd*, 889 F.2d 1280 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1811 (1990). Once termination or nonrenewal has been established, the defendant franchisors 'then bear the burden of establishing as an affirmative defense that the termination or nonrenewal was permitted under the Act.' 726 F. Supp. at 359. *See also* 15 U.S.C. §2805(c)." *Id.* at 748.

Similarly, in *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1436 (CA10 1987), the Tenth Circuit, construing 15 U.S.C. §2805(c), explained: "In other words, in any PMPA action, including an action for an injunction, the franchisor bears the burden of establishing its compliance with the statute."[5]

Here, it is undisputed that Exxon decided not to renew Keener's franchise. Thus, it is undisputed that Keener established a prima facie case that Exxon violated

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[5] The decisions of the First and Tenth Circuits regarding allocation of the burdens of proof under the PMPA, but not the holding of the Fourth Circuit in *Keener*, are faithful both to the statutory language of §2805(c) and to the legislative history of the PMPA. *See* S. Rep. No. 731, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874 ("The provisions of title I are enforceable by private civil action in U.S. District Court. Money damages and injunctive relief are authorized. *The legislation places on the franchisor the burden of proving compliance with all statutory requirements.*") (emphasis added); *id.* at 41, *reprinted in* 1978 U.S.C.C.A.N. at 899 ("In any action authorized by section 105, the franchisee has the burden of proving the existence of a franchise, his status as a franchisee, and the termination of the franchise or the nonrenewal of the franchise relationship. *Thereafter, the burden is shifted to the franchisor to prove as an affirmative defense that the termination was permitted under section 102(b) or section 103.*") (emphasis added).

the PMPA. Under the statutory scheme enacted by Congress, the burden shifted to Exxon to establish as an affirmative defense that nonrenewal was permitted under section 2802(b). *See* 15 U.S.C. §2805(c).

In order for Exxon to establish as an affirmative defense that nonrenewal of Keener's franchise was permitted under section 2802(b), Exxon had to show that it extended to Keener a "right of first refusal," it being undisputed that Exxon never made to Keener a "bona fide offer to sell." *Id.* §2802(b)(3)(D)(iii). As Keener has shown, a valid right of first refusal requires that the same price and the same other terms and conditions contained in a third party's offer be extended to the holder of the right.

While Congress has thus placed the burden upon the oil company to establish that *both* the same price *and* the same other terms and conditions were offered to the holder of the right of first refusal, here the Fourth Circuit panel majority has reversed Congress's placement of one of those burdens. Under the Fourth Circuit's holding, once an oil company shows that the purchase price offered by a third party was the same purchase price offered to the holder of the right of first refusal, the burden then shifts to the former franchisee – despite clear statutory language to the contrary – to establish that the third party is purchasing a package of items different from that being offered to the former franchisee.[6]

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[6] Obviously, the same price is a necessary, but not a sufficient, condition of having a right of first refusal. The mere fact that the prices are identical suggests neither that the items offered for sale are also identical nor that they are different. All

The reasons the Fourth Circuit panel majority gave for judicially vitiating Congress's express presumption of oil company noncompliance with the PMPA and substituting a directly opposite presumption of oil company compliance, *see Keener*, 32 F.3d at 131; App. to Pet. for Cert. 8a, were that claims under the PMPA "intrude upon normal business operations" and are "disruptive of the market efficiency the PMPA sought to maintain," *see id.*

As Judge Murnaghan's dissent and the decisions of numerous other federal courts of appeals make clear, however, Congress intended the PMPA to benefit franchisees, not oil company franchisors. If, as the Fourth Circuit panel majority appeared to believe, Congress went too far in favoring the interests of franchisees, the proper remedy lies with Congress, not in the judicial nullification of Congress's legislation.

The Third Circuit, in *Slatky v. Amoco Oil Co.*, 830 F.2d 476 (1987) (in banc), rejected the very same "need for ease of administration" argument that the Fourth Circuit accepted here. In an opinion by Judge Becker that

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that the fact of same price shows is the existence of an element common both to valid rights of first refusal and to invalid price manipulations.

As the Fourth Circuit itself once recognized, "allocations of price to elements of a package may readily be manipulated *to defeat* contractual rights of first refusal. It is easy to imagine an unreasonably inflated value assigned to the subject of any first-refusal option." *Pantry Pride Enters., Inc. v. Stop & Shop Cos.*, 806 F.2d 1227, 1231-32 (1986) (emphasis in original). The presumption adopted by the Fourth Circuit panel majority in *Keener* permits oil companies such as Exxon to defeat congressionally conferred rights of first refusal by engaging in the very type of price manipulation condemned in *Pantry Pride*.

referred to Amoco Oil Company and other oil companies as "distributors," the Third Circuit explained in *Slatky* that:

> "the very act of passing the PMPA indicated Congress's rejection of the view advanced by the major gasoline retailers that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony. *See, e.g., Senate Hearings, supra,* at 319-22 (statement of Kenneth E. Curtis, Vice-President of Marketing for Amoco). While a subjective good faith standard would probably enable distributors to pursue their own, unfettered self-interest, the statute does not generally guarantee distributors that right. We therefore reject this goal as a guiding principle for interpreting the bona fide offer provision." *Id.* at 483.

Similarly, in *Hilo v. Exxon Corp.*, 997 F.2d 641 (CA9 1993) (O'Scannlain, J.), the Ninth Circuit explained:

> "Our general approach to the construction and application of the PMPA is well established. As we recently observed, 'the overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship.' *Ellis v. Mobil Oil*, 969 F.2d 784, 788 (9th Cir. 1992) (quoting *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 484 (3d Cir. 1987)). In addition, '[a]s remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees.' *Humbolt Oil Co. v. Exxon Co., U.S.A.*, 695 F.2d 386, 389 (9th Cir. 1982) (citation omitted)." *Id.* at 643.[7]

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[7] *See also Brach v. Amoco Oil Co.*, 677 F.2d 1213 (CA7 1982): "The statutory scheme of the PMPA seeks to strike a balance between the interests of the participants in a petroleum

From the outset, judicial interpretation of the PMPA has been marred by "conflict and diversity." *See, e.g.*, Lorin M. Kleeger, Comment, *Judicial Interpretation of the Petroleum Marketing Practices Act: Conflict and Diversity*, 32 Emory L.J. 273, 274 (1983) ("judicial construction of the PMPA has defeated congressional intent").

Here, the Fourth Circuit has created a circuit split on the meaning of what constitutes a valid "right of first refusal" under the PMPA. The Fourth Circuit has also engrafted onto the PMPA a strong judicial presumption of oil company compliance despite Congress's express presumption in 15 U.S.C. §2805(c) of oil company noncompliance.

The Fourth Circuit's decision involves a matter of utmost importance to thousands of petroleum franchisees, and to other holders of statutory rights of first refusal, as to which the courts of appeals are in disagreement. The Fourth Circuit's decision also provides an opportunity for this Court to explain that where Congress has expressly established a presumption, a court may not override Congress and establish – through an unprincipled act of judicial legislation – a directly contrary presumption.

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marketing franchise relationship. Congress recognized the disparity of bargaining power between franchisor and franchisee and the harsh consequences of suddenly terminating a business for which the franchisee has worked long and hard to develop goodwill." *Id.* at 1220.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

| | |
|---|---|
| ALSTON R. KEENER,<br>*Plaintiff-Appellant,*<br>v.<br>EXXON COMPANY, USA, a foreign corporation; EXXON CORPORATION, a foreign corporation,<br>*Defendants-Appellees,*<br>and<br>ALAN ENTERPRIZES, a West Virginia Limited Liability Company; JOE DEFAZIO OIL COMPANY, a West Virginia Corporation; JOSEPH A. DEFAZIO, individually and as organizing partner number one of Alan Enterprizes, a West Virginia Limited Liability Company; JOSEPH DEFAZIO, individually and as organizing partner number two of Alan Enterprizes, a West Virginia Limited Liability Company,<br>*Defendants.* | No. 94-1142 |

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge.
(CA-92-95)

Argued: June 6, 1994

Decided: August 15, 1994

Before MURNAGHAN, WILKINSON, and WILKINS, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the majority opinion, in which Judge Wilkins joined. Judge Murnaghan wrote a dissenting opinion.

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## COUNSEL

**ARGUED:** Thomas Matthew Wilson, III, TYDINGS & ROSENBERG, Baltimore, Maryland, for Appellant. Gaspare Joseph Bono, HOWREY & SIMON, Washington, D.C., for Appellees. **ON BRIEF:** Lynn A. Kohen, TYDINGS & ROSENBERG, Baltimore, Maryland; Paul Cranston, Morgantown, West Virginia, for Appellant. Robert G. Abrams, Robert E. Leidenheimer, Jr., HOWREY & SIMON, Washington, D.C., for Appellees.

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## OPINION

WILKINSON, Circuit Judge:

The question in this case is whether a gasoline station franchisee had an opportunity to exercise a valid right of first refusal as established by the Petroleum Marketing Practices Act ("PMPA"). *See* 15 U.S.C. §§ 2801-2806. Under the Act, a franchisor desiring to sell a station operated by a franchisee must either make a bona fide offer of sale to the franchisee or give the franchisee an opportunity to buy the station on the same terms as a third party offer. *See* 15 U.S.C. § 2802(b)(3)(D)(iii). Here, the franchisor pursued the second route and offered the

franchisee the station at the same price bid by a third party. This fact creates a strong presumption that a valid right of first refusal was extended. Because plaintiff's evidence is insufficient to overcome that presumption, we affirm the district court's decision that the franchisor complied with the PMPA's right of first refusal provision.

## I.

In 1984, Exxon began construction of a service station in Morgantown, West Virginia. After the station was completed, it was leased to Alston Keener as Exxon's dealer-franchisee. Under the agreement with Exxon, Keener paid monthly rent and the costs of the gasoline he purchased from Exxon. The franchise was a profitable one, and the two parties signed a lease renewal in November 1988. The new lease was scheduled to run until March 1, 1992.

In 1991, Exxon began considering ways to improve the efficiency of its gasoline supply system. As part of that plan, Exxon decided it would phase out the use of dealer-operated stations in certain markets and sell those station sites to Exxon's independent distributors.[1] One of the markets selected for the new system included the Morgantown area. Exxon determined that part of the new strategy required sale of the station leased by Keener. It thus notified Keener on September 26, 1991 that his lease would not be renewed.

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[1] Before the new policy, stations such as Keener's were apparently supplied either by an independent Exxon-brand distributor that purchased gasoline from Exxon and delivered it to the station site, or on a direct-service basis by Exxon itself.

Exxon, following the procedures it had established for the sale of stations, solicited bids for the purchase of Keener's station from six Exxon-brand distributors in the region. The solicitations informed bidders that the minimum acceptable price was $547,000 and that Exxon would require an option to repurchase the station if the site ceased selling Exxon-brand gasoline at any time over the next twenty-one years. Three distributors ultimately bid on the station, with the high bid of $1,200,010 coming from Joe DeFazio Oil Company. Keener was notified of this bid on December 17, 1991, and offered a right of first refusal pursuant to 15 U.S.C. § 2802(b)(3)(D)(iii)(II). Exxon explained that Keener would have sixty days to purchase the station at the same price as DeFazio had bid. Exxon also told Keener that he would not be required to provide Exxon with the option agreement.

Keener then began negotiations with several other Exxon distributors in the area to determine whether they would provide him with Exxon products should he decide to purchase the station. Both Clements Oil Company and Hess Oil Company offered to sell Keener Exxon gasoline. However, Keener did not choose to match DeFazio's price. Instead, Keener asked Exxon to sell him the station at its "fair market value." Exxon declined, and sold the station premises to DeFazio.

Keener subsequently filed suit in West Virginia state court. The suit was removed to federal district court in West Virginia and then transferred with the parties' consent to federal district court in Maryland. Keener contended that the right of first refusal contained in 15 U.S.C. § 2802(b)(3)(D)(iii)(II) of the PMPA meant that he was entitled to buy the same thing DeFazio Oil bid on at

the same price DeFazio Oil offered. Exxon had not honored that entitlement, he claimed, because DeFazio Oil had bid on the station with the extra advantage of Exxon's promise to provide DeFazio Oil with a supply of gasoline. Because he was not actually being offered the same thing DeFazio Oil had bid on, Keener claimed, Exxon's actions violated the PMPA. Keener therefore requested that the court either (1) order DeFazio Oil to transfer the station to Keener for the asserted "fair market value" of $547,000, or (2) find Exxon liable for $653,010, the difference between $547,000 and the price DeFazio paid.

The district court rejected Keener's argument and granted summary judgment for Exxon. Contrary to Keener's claim, the district court found that he had, in fact, been offered the opportunity to purchase Exxon's interest in the property on the same terms as DeFazio. Indeed, the court concluded that because Keener did not have to provide Exxon with the repurchase option, "[t]he deal offered to Keener was thus more advantageous" than that offered to other bidders. The district court also noted that Keener could have continued to operate the premises as an Exxon station if he had matched the DeFazio Oil offer and then bought gasoline from an Exxon distributor. Once Keener declined to exercise his right to match the DeFazio Oil bid, the district court concluded, Exxon acted appropriately under the PMPA in selling the station to DeFazio.

Keener now appeals.

## II.

The PMPA itself contains no statement of legislative purpose, but the background of its passage has left that purpose clear. There was much concern expressed that franchisors had used the threat of franchise termination to impose harsh conditions upon the business operations of franchisees. *See* S. Rep. No. 95-731, 95th Cong., 2d Sess. 17-19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 875-77. The Act did not create absolute protection for franchises, however; it established only "minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." 1978 U.S.C.C.A.N. at 873; *see Tobias v. Shell Oil Co.*, 782 F.2d 1172, 1174 (4th Cir. 1986).

The establishment of only minimal standards was motivated in part by the desire to limit federal intrusion into the property rights of the franchisor. *See Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986). Similarly, the Act intended to preserve the "flexibility" of petroleum delivery markets. 1978 U.S.C.C.A.N. at 877; *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 486-87 (3d Cir. 1987); *Radecki v. Amoco Oil Co.*, 634 F. Supp. 1393, 1401 (D. Minn. 1986). Congress understood that an industry driven by national and international market forces faces rapidly changing conditions. Such market uncertainties underscored the need for the petroleum industry to retain maximum economic efficiency in all areas, including the delivery of gasoline to individual consumers. *See* 1978 U.S.C.C.A.N. at 877 (noting the importance of preserving

franchisor ability to respond to "changing market conditions"); *see also May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989).

The PMPA preserves the flexibility of petroleum delivery markets by ensuring that sound business judgment does not become a casualty of constant judicial oversight. *See Valentine*, 789 F.2d at 1392 n.7. Section 2802(b)(3)(D)(iii), the provision at issue here, demonstrates the point. Once a franchisor makes the determination not to renew a franchise and sell the franchise station, the franchisor has two options. It may either make the franchisee a "bona fide offer to sell" the station, or it may provide the franchisee with a "right of first refusal" at a price offered by a third party buyer.[2] Providing the franchisor this choice demonstrates the statute's flexibility; more importantly, both options included in § 2802(b)(3)(D)(iii) fully reserve the price determining function to market actors.

## III.

In the case before us, Exxon made a business judgment that its distributors were in the best position to

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[2] Specifically, the franchisor must have either:

> (I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or
>
> (II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

15 U.S.C. § 2802(b)(3)(D)(iii).

efficiently deliver company products to the consumer, and the value of the station was determined by competitive bidding among those distributors. Keener, of course, did not disappear from the picture: once DeFazio extended the $1,200,010 bid, Exxon gave Keener the opportunity to purchase the station at that price. *See* 15 U.S.C. § 2802(b)(3)(D)(iii)(II). Instead of exercising this right of first refusal, Keener chose to challenge the propriety of Exxon's actions through litigation.

Keener's challenge rests on the assertion that the property Exxon offered him somehow differed from what DeFazio Oil had offered to buy. The fact that Exxon offered Keener the service station at the same price DeFazio Oil had bid, however, creates the strong presumption that Exxon fulfilled its right of first refusal obligation under § 2802(b)(3)(D)(iii)(II). This presumption that a same price offer evidences statutory compliance reflects the recognition that claims such as Keener's intrude upon normal business operations once filed. Indeed, Keener's suit, by calling into question DeFazio Oil's continued operation of the station, can only have made it more difficult for DeFazio to manage its business affairs. Such a result, of course, is disruptive of the market efficiency the PMPA sought to maintain. Accordingly, early resolution of claims is of special significance in the PMPA context, and a presumption of statutory compliance where Exxon offered the same station for the same price facilitates that end. The presumption also comports with the desire not to transform a simple statutory requirement into a complex and cumbersome one necessitating a detailed economic analysis of private sector decisions. *See Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 377 (4th

Cir. 1992) (per curiam). It remains only to determine whether Keener has made a sufficient showing to create a triable issue of fact in the face of that presumption.[3]

## IV.

### A.

Keener asserts that Exxon sold DeFazio Oil both a gasoline supply commitment and the station proper, whereas Exxon offered him only the opportunity to buy the station. This position finds only minimal support in the record. There is, of course, evidence that Exxon planned to, and ultimately did, increase the gasoline supply to the distributor who purchased the station. This evidence does not mean, however, that the purchase of the station entitled DeFazio Oil to the increased allotment. DeFazio Oil still had to apply separately for the

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[3] The dissenting opinion argues that the foregoing presumption is one that is created out of "whole cloth," and one that bears no relation to the purposes of the statute. To the contrary, the presumption is directly tied to the statutory requirement that a right of first refusal be extended. As a matter of basic logic, a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by a third party. Moreover, a presumption is often necessary to afford guidance to district courts in the course of the summary judgment process and to prevent a straightforward statutory requirement from becoming a litigious quagmire. Courts have routinely structured statutory proof schemes through the mechanism of presumptions. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The dissent's approach, by contrast, would leave litigants and district courts at sea.

increased allotment to supply the station.[4] If its distributorship were terminated, its right to purchase gasoline from Exxon for the station would end. In this respect, DeFazio's position bore a substantial similarity to that of Keener. Keener had every opportunity to assure a similar allotment of Exxon gasoline for himself by signing a contract with one of two Exxon distributors that offered to supply him if he purchased the station. Whatever points Keener wishes to make with respect to DeFazio's relationship with Exxon are thus significantly blunted by his own ability to secure supplies of Exxon gasoline.

Keener's real complaint is that DeFazio Oil had some sort of unfair advantage in the bargaining process by being able to deal directly with Exxon. Whatever advantage DeFazio Oil may have had, however, resulted from its preexisting distributor relationship with Exxon, not from the contract for sale of the station. Because DeFazio Oil already routinely purchased and distributed Exxon gasoline in the region, it was a relatively simple matter for the company to expand its existing distribution contract requirements with Exxon to accommodate the increased gasoline supply it would need to operate the station. Such advantages are in no sense impermissible; the PMPA does not prohibit the sale of stations to distributors, and federal courts are not in the business of equalizing all advantages on the market's playing field. It also

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[4] Keener contends that this point is irrelevant because the DeFazio Oil bid was not finalized into an actual sale until after the increased allotment had been approved. This contention still provides no indication that the station sales contract in itself guaranteed DeFazio Oil a supply of Exxon gasoline.

should not be forgotten that DeFazio's position as a distributor caused him some harm as well. It is undisputed that Keener did not have to provide Exxon with the repurchase option that all the distributors bidding on the station were required to accept. As a result, Keener had the advantage of being offered the station unencumbered by any contractual restrictions. The point here is that bidders routinely come to the table with different hands, and Keener can make no claim based on the fact that DeFazio Oil's preexisting commercial relationships gave it certain advantages in setting up an Exxon franchise at the station site.

B.

Keener also argues that the price DeFazio Oil paid demonstrates that more than just the station was at stake. He notes that Exxon initially appraised the station at $370,000 and ultimately approved a minimum sale price of $547,000. From these facts, Keener concludes that $547,000 is the value of the station alone, and argues that the discrepancy between this figure and the $1,200,010 DeFazio Oil paid can only be explained by the fact that DeFazio also purchased a guaranteed supply of Exxon gasoline.

This position suffers from several infirmities. To begin with, Keener downplays the fact $547,000 was simply the minimum acceptable price Exxon set for the station. This price thus represents nothing more than a floor on the bidding process. It is not necessarily Exxon's valuation of what it believed the station was likely to bring on the market.

More importantly, Keener's position reflects the belief that fair market value can most accurately be calculated in the abstract. However, fair market value is, by necessity, best set by the market itself. An actual price, agreed to by a willing buyer and a willing seller, is the most accurate gauge of the value the market places on a good. Until such an exchange occurs, the market value of an item is necessarily speculative. *See Amerada Hess Corp. v. Commissioner of Internal Revenue*, 517 F.2d 75, 83 (3d Cir. 1975). Here, the only such agreed upon price was the $1,200,010 bid that DeFazio Oil made. That price is a measure of what the station was worth to a distributor in DeFazio's position.[5] The fact that a final bid turns out to be higher than the level at which the bidding opens is not just endemic to the bidding process, but the commercially reasonable hope of every offeror. As a PMPA offeror, Exxon was entitled to seek the best purchase price that it could find for its property. The fact that it received such a price does nothing to strengthen plaintiff's case.

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[5] Because of its distributorship, DeFazio was able to purchase gasoline at the "rack" price. This price advantage most likely made it possible for DeFazio to bid a higher amount and still turn a profit operating what all admit was a high volume station. The $1,200,010 payment may, therefore, be termed the fair market value of the station. Indeed, when a third party makes an offer in cash, or its equivalent, for an item, a "court can justifiably infer that the amount of an arms' length offer represents the value of the station." *Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992).

V.

Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision. This conclusion is strengthened by the fact that Keener has never sought a form of relief consonant with his stated injury. He has never offered to match DeFazio's bid. Instead, Keener has sought a court order mandating the transfer of the station to him for the $547,000 price floor set by Exxon, or damages based on the difference between the $547,000 price and the price DeFazio bid. Both these remedies would allow Keener to capture an unacceptable windfall based on an erroneous fair market valuation. *See Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473, 476 (N.D. Ill. 1985). We cannot accept the view that the protection of franchisees under the PMPA requires any such bonanza, particularly where the franchisor has done nothing more than get the best value it could for its property.

For the foregoing reasons, the judgment of the district court is

*AFFIRMED.*

**MURNAGHAN,** Circuit Judge, dissenting:

The sole issue on appeal is whether the terms of Exxon's offer to Keener were identical to the terms of DeFazio Oil's offer to Exxon. *See Razavi v. Amoco Oil Co.*, 833 Supp. 1, 8 (D.D.C. 1993) (stating that the "right of first refusal" provision of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2802(b)(3)(D)(iii)(II), obliges a franchisor to offer to sell its gasoline station to the franchisee "on terms *identical* to those the [franchisor] has

received from another" (emphasis added)); *Ellis v. Mobil Oil Corp.*, 708 F. Supp. 1094, 1096 (D. Ariz. 1989) (same), *aff'd in relevant part*, 969 F.2d 784 (9th Cir. 1992); *see also Atlantic Ave. Oil & Gas Ltd. v. Texaco Ref. & Mktg., Inc.*, 699 F. Supp. 27, 31 (E.D.N.Y. 1988) ("A right of first refusal is a right to buy *on the same terms* offered by a third party." (emphasis added)), *aff'd*, 870 F.2d 93 (2d Cir. 1989).

On appeal from the entry of summary judgment, we must construe the terms of the offers by viewing all of the record evidence, and all reasonable inferences that may be drawn therefrom, in the light most favorable to Keener, the party opposing summary judgment. *See Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). As the franchisor, Exxon bears the burden of going forward with evidence to establish that the terms of the two offers were identical. *See* 15 U.S.C. § 2805(c).

Under the terms of DeFazio Oil's offer to Exxon, DeFazio Oil gave Exxon (1) $1.2 million, and (2) an option to repurchase the service station if it ceased to be used to sell Exxon-brand motor fuel at any time in the next twenty-one years. Exxon gave DeFazio Oil (1) the station, (2) the right to display Exxon's trademark at the station, and (3) the right to purchase a sufficient supply of Exxon-brand motor fuel, at the relatively low "rack" price, to meet the station's needs (*i.e.*, approximately 1.7 million gallons of fuel per year).

The terms of Exxon's offer to Keener were much simpler: Keener would have to have given Exxon $1.2 million and Exxon would had to have given Keener the station. Clearly, the express terms of the two offers were *not* identical. As an example, the promise of a sufficient

supply of Exxon-brand motor fuel at the "rack" price was not to be given.

Furthermore, Exxon has pointed to nothing in the record to suggest that the value of the repurchase option equalled the sum of the values of the trademark agreement and the gasoline supply commitment. Indeed, there is evidence to the contrary. Purchasing from an Exxon distributor (who would himself first purchase at the "rack" price) instead of from Exxon itself is obviously less advantageous since some additional profit would be due to the distributor. Thus, the Court has no basis for holding that the two offers were equivalent, either in their express language *or* in their economic worth. Therefore, I would vacate the grant of summary judgment and remand the case to the district court.

The majority avoids that result by creating out of whole cloth a "strong presumption" that, whenever two offers contain the same purchase price, a valid right of first refusal has been extended – regardless of whether the same items were being purchased at that price. The majority's "strong presumption" finds no support in the plain language of the PMPA or in the case law interpreting that statute. Furthermore, it makes no sense to presume that an offer to buy several valuable property interests (*e.g.*, a station plus the right to use a trademark plus the right to distribute a supply of fuel) and an offer to buy only one of those interests (*e.g.*, a station) are "identical" merely because the dollar amounts contained in the bids are the same. Moreover, the majority's creation of the "strong presumption" could undermine the very purpose of the PMPA – to protect relatively weak local franchisees from the unfair business practices of powerful

and sophisticated oil companies. *See Barnes v. Gulf Oil Corp.*, [824] F.2d 300, 306 (4th Cir. 1987) ("[The PMPA] was *designed* to benefit the small retailer. . . . " (emphasis in the original)); *id.* at 305 ("As remedial legislation, the [PMPA] must be given a liberal construction consistent with its goal of protecting franchisees." (citation and internal quotation marks omitted)).* Therefore, I respectfully dissent.

---

*I recognize that the hard task of interpreting statutes can, in some cases, be aided by the application of judicially-created presumptions. *See generally* J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U.L. Rev. 907 (1992). In my view, however, this is not a proper case in which to apply such a presumption.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| ALSTON R. KEENER | * | CIVIL NO. |
| | * | 92-0095-C (W. Va.) |
| v. | * | |
| EXXON COMPANY, | * | |
| U.S.A., et al. | * | |

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YOUNG, Joseph H., Senior United States District Judge

Date: December 17, 1993

MEMORANDUM

This case was transferred to the United States District Court for the District of Maryland from the Northern District of West Virginia. Defendants Exxon Company,

U.S.A. and Exxon Corporation ("Exxon"), Alan Enterprizes, Joe DeFazio Oil Company, Joseph A. DeFazio, and Joseph DeFazio ("DeFazio") seek Summary Judgment against Plaintiff Alston Keener ("Keener"), a former franchisee of Exxon. Keener has cross-filed for Partial Summary Judgment against defendants.

## OPINION

### I.

In 1984, Exxon purchased a parcel of land and built a service station in Morgantown, West Virginia. Keener leased the station from Exxon, paying a monthly rent and purchasing a high volume of Exxon products. On November 10, 1988, Keener and Exxon renewed their franchise agreement for a three-year period beginning February 13, 1989 and ending March 1, 1992.

In 1991 Exxon decided to shift from dealer-based to distributor-based operations in certain markets, including the area served by Keener's station. By letter dated September 26, 1991, Exxon notified Keener that it would not renew the franchise agreement, but agreed to extend the existing franchise to October 1, 1992. Exxon also informed Keener that he would be given an opportunity to purchase the station premises.

Exxon requested six of its distributors to submit bids for the premises, on the condition that the bids be not less than $547,000, the appraised value of the property. Exxon also required the bidders to agree to grant it an option to repurchase the station if at any time during the next

twenty-one years Exxon products were no longer offered for sale at the station.[1]

DeFazio, an Exxon distributor since 1956, submitted the highest bid of $1,200,010 for the station premises, including the land, building, and equipment. By letter dated December 17, 1991, Exxon offered Keener a sixty-day right of first refusal to buy the station for $1,200,010 pursuant to 15 U.S.C. § 2802(b)(3)(D)(iii)(II) of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. However, Exxon did not require Keener to grant it an option to repurchase the property if Exxon products were not sold at the station within twenty-one years of the sale.

Keener would have had to enter into a separate agreement with an Exxon distributor to operate the premises as an Exxon station. He negotiated with at least two distributors: Clements Oil Company, Inc. ("Clements") and Hess Oil Company, Inc. ("Hess"). Clements and Hess agreed to supply Exxon fuel and products to Keener if he purchased the station. Hess agreed to sell Keener Exxon fuel at a lower price than DeFazio.[2] Keener did not exercise the right of first refusal granted by Exxon.

---

[1] Exxon also retained the right to repurchase the property if (1) Exxon decided that changes in the law posed too great a risk for continued ownership and operation by an Exxon-branded distributor; (2) at any time during the last eleven years of the twenty-one year period the station failed to meet Exxon's "retail image design standard"; or (3) anyone other than another Exxon distributor offered to purchase the property.

[2] These supply agreements are not before this Court.

Instead, Keener sought a franchise arrangement with DeFazio. When those negotiations did not produce an agreement,[3] Keener filed a Notice of Lis Pendis [sic] with the Clerk of the Circuit Court of Monongalia County, West Virginia on October 1, 1992, to notify the defendants that he claimed an interest in the property. The sale to DeFazio was completed on October 2, 1992.

II.

Summary judgment is appropriate only after adequate time for discovery and if there are no genuine issues of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must not weigh the evidence and determine the truth, but must resolve all reasonable inferences and questions of law in the nonmoving party's favor. *Id.* at 255; *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

Exxon argues that summary judgment is appropriate because it complied with the provisions of the PMPA when it decided to terminate Keener's franchise and sell the station. A franchisor may refuse to renew a franchise if, after a good faith determination in the normal course of business, the franchisor either:

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[3] DeFazio notified Keener on September 24, 1992 that it would not lease the property to Keener, and that the premises should be vacated on October 1, 1992.

> (I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interest in such premises; or
>
> (II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

15 U.S.C. § 2802(b)(3)(D)(iii). Thus, Exxon had a choice of making Keener a bona fide offer to sell the premises or of offering Keener a right of first refusal at DeFazio's bid. When Exxon decided to sell the station and DeFazio submitted the highest of six bids, Keener had a right of first refusal. *See Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992) (§ 2802(b)(3)(D)(iii)(II) is applicable when the franchisor decides to sell the premises and a third party offers to purchase it); *Atlantic Ave. Oil & Gas v. Texaco Refining*, 699 F. Supp. 27, 29 (E.D. N.Y. 1988), *aff'd*, 870 F.2d 93 (2d Cir. 1989) (same).

Keener argues that the right of first refusal was inadequate because Exxon's offer to him was not identical to that offered to DeFazio. The right of first refusal must provide the franchisee with the opportunity to purchase the "franchisor's interest" in the property, § 2802(b)(3)(D)(iii); *see Atlantic*, 699 F. Supp. at 30; *Greco v. Mobil Oil Corp.*, 597 F. Supp. 468, 473 (N.D. Ill. 1984), and on the same terms as offered by the third party. *Atlantic*, 699 F. Supp. at 31.

Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio. Indeed, Keener was not required to provide Exxon with an option to repurchase the station if Exxon-brand fuel was not

offered for sale at the station during the first twenty-one years after the sale; whereas, DeFazio was required to grant Exxon such an option. The deal offered to Keener was thus more advantageous to Keener and complied with the above provisions of the PMPA.

Keener also argues that Exxon violated the meaning of the PMPA by terminating his franchise and offering to sell the station to other franchisees. He contends that such an arrangement made it impossible for him to match the highest bid. There is nothing in the language of the PMPA suggesting that such an argument is meritorious. *See May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 921 (6th Cir. 1989) (the Act should "not be interpreted to reach beyond its original language").

Keener's position is also contrary to the PMPA's purpose. Congress enacted the PMPA to protect "franchisees from arbitrary or discriminatory termination or nonrenewal of their franchises." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15 (S. Rep.), reprinted in 1978 U.S. Code Cong. & Ad. News 873, 874. The statute sought to remedy the problems that resulted from the disparity of bargaining power between franchisor and franchisee, and to effectuate the franchisee's reasonable expectation that the franchise relationship would be a continuing one. S. Rep. at 17-8, reprinted in 1978 USCAAN [sic] at 876. However, Congress also intended to allow franchisors adequate flexibility to "initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." S. Rep. at 19, reprinted in 1978 USCAAN [sic] at 877. During a period of economic instability, petroleum firms must retain flexibility to improve efficiency through restructuring.

Further, the undisputed evidence shows that Keener could have operated the station as an Exxon station, though not as an Exxon franchisee himself, for at least the same costs he incurred as a franchisee. He could have, and in fact attempted, to enter into an arrangement with different Exxon distributors, including DeFazio, to buy Exxon products from a distributor rather than direct from Exxon. However, Keener elected not to exercise his right of first refusal and not to match the highest bid for the station. The cancellation of his franchise agreement was irrelevant to his inability to match DeFazio's $1.2 million purchase price.

III.

Keener received a legitimate right of refusal under § 2802(b)(3)(D)(iii)(II), which he elected not to exercise and, therefore, no factual issues are in dispute and Exxon is entitled to summary judgment as a matter of law.

/s/ Joseph H. Young
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| ALSTON R. KEENER | * | |
| | * | CIVIL NO. |
| v. | * | 92-0095-C (W. Va.) |
| EXXON COMPANY, U.S.A., et al. | * | |

ORDER

In accordance with the attached Memorandum it is this 17th day of December, 1993, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendants' Motion for Summary Judgment BE, and the same IS, hereby GRANTED; and

2. That Plaintiff's Cross Motion for Partial Summary Judgment BE, and the same IS, hereby DENIED;

3. That the judgment BE, and the same IS, hereby entered in favor of Defendants; and

4. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

(Filed September 23, 1994)

No. 94-1142
CA-92-95

ALSTON R. KEENER

Plaintiff-Appellant

v.

EXXON COMPANY, USA, a foreign corporation; EXXON CORPORATION, a foreign corporation

Defendants-Appellees

and

ALAN ENTERPRIZES, a West Virginia Limited Liability Company; JOE DEFAZIO OIL COMPANY, a West Virginia Corporation; JOSEPH A. DEFAZIO, individually and as organizing partner number one of Alan Enterprizes, a West Virginia Limited Liability Company; JOSEPH DEFAZIO, individually and as organizing partner number two of Alan Enterprizes, a West Virginia Limited Liability Company

Defendants

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ORDER

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Appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court.

The panel considered the petition for rehearing and is of the opinion that it should be denied. Judges Wilkinson and Wilkins voted to deny rehearing. Judge Murnaghan voted to grant rehearing.

In a requested poll of the Court on the suggestion for rehearing en banc, Judges Russell, Hall, Wilkinson, Wilkins, Niemeyer, Luttig, and Williams voted to deny rehearing en banc; and Judges Widener, Murnaghan, and Michael voted to grant rehearing en banc. Judges Ervin, Hamilton, and Motz did not participate in the poll of the Court.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as the majority has voted to deny rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

FOR THE COURT

/s/ Bert M. Montague
CLERK

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## LIST OF OTHER STATUTES IN WHICH CONGRESS UTILIZED PHRASE "RIGHT OF FIRST REFUSAL"

1. 7 U.S.C. §1738p(d)(2) – Enterprise for the Americas Initiative Act of 1992. Giving certain foreign countries a right of first refusal to purchase their own debt before debt may be sold, reduced or canceled by the President of the United States.

2. 7 U.S.C. §1985(e)(1)(E) – Consolidated Farmers Home Administration Act of 1961, as amended. Stating that rights provided to farmers under the statute are "in addition to any such rights of first refusal under the law of the State in which the property is located."

3. 7 U.S.C. §2000(d) – Food Security Act of 1985, as amended. Giving farmers right of first refusal to acquire homestead property and providing that the "terms and conditions [of the right] shall not be less favorable than those intended to be offered to any other buyer."

4. 10 U.S.C. §2835(f) – National Defense Authorization Act for Fiscal Years 1992 and 1993. Giving the United States "the right of first refusal to acquire all right, title, and interest" in certain military housing facilities.

5. 12 U.S.C. §1701z-11(e) – Housing and Community Development Amendments of 1978, as amended. Giving State and local governments a right of first refusal to purchase multifamily housing projects owned by Secretary of Housing and Urban Development.

6. 12 U.S.C. §2219a – Agricultural Credit Act of 1987. Giving farmers right of first refusal to purchase or lease property of theirs that has been foreclosed upon.

7. 12 U.S.C. §4111(b)&(c) – Cranston-Gonzales National Affordable Housing Act, as amended. Giving "priority purchasers" the right of first refusal to purchase certain eligible low-income housing.

8. 16 U.S.C. §159g(b) – Act to Revise Boundaries of Saratoga National Historical Park. Giving Secretary of the Interior a right of first refusal to purchase any privately owned land in the Saratoga National Historical Park that is to be put up for sale.

9. 16 U.S.C. §460x-11(e)(3) – Act to Establish Sleeping Bear Dunes National Lakeshore, as amended. Giving Secretary of the Interior a right of first refusal to purchase certain scenic land in the Sleeping Bear Dunes National Lakeshore area.

10. 16 U.S.C. §460aaa-3(a) – Act to Establish Grand Island National Recreation Area. Giving Secretary of the Interior a right of first refusal to purchase certain land within the Grand Island National Recreation Area.

11. 16 U.S.C. §698k – Act to Establish Big Cypress National Preserve, as amended. Requiring Secretary of the Interior to offer to the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida the right of first refusal to provide revenue-producing visitor services in the Big Cypress National Preserve.

12. 16 U.S.C. §1246(e) – National Trails System Act, as amended. Requiring Secretary of the Interior or Secretary of Agriculture to offer right of first refusal to original owner of land acquired by either Secretary for inclusion in the national scenic or national historic trail in the event that the trail is permanently relocated.

13. 16 U.S.C. §3197(b)(3) – Alaska National Interest Lands Conservation Act. Requiring Secretary of the Interior to give right of first refusal to Cook Inlet Region, Incorporated, in cooperation with Village Corporations within the Cook Inlet Region, when appropriate, to provide new revenue-producing visitor services within the Kenai National Moose Range or that portion of the Lake Clark National Park and Preserve within the boundaries of the Cook Inlet Region.

14. 20 U.S.C. §1132f-7(d) – Higher Education Amendments of 1986. Giving Student Loan Marketing Association a right of first refusal to purchase all of the voting common stock owned by the Secretary of Education in the College Construction Loan Insurance Corporation.

15. 24 U.S.C. §225(b)(4) – Saint Elizabeths Hospital and District of Columbia Mental Health Services Act. Granting former employees of Saint Elizabeths Hospital in Washington, D.C., a right of first refusal to acquire employment in comparable positions created by the District of Columbia.

16. 24 U.S.C. §225d(d)(1) – Saint Elizabeths Hospital and District of Columbia Mental Health Services Act. Granting former employees of Saint Elizabeths Hospital "a right-of-first-refusal to employment in comparable available positions for which they qualify within the Department of Health and Human Services in the Washington metropolitan area."

17. 26 U.S.C. §42 – Internal Revenue Code. Providing that "[n]o Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified

low-income building merely by reason of a right of 1st refusal held by the tenants . . . . "

18. 40 U.S.C. §1205(a)(5)(C) – Judiciary Office Building Development Act. Granting to Chief Justice of the United States a right of first refusal to use unoccupied space in buildings that were constructed to meet the needs of the judicial branch.

19. 42 U.S.C. §2113(b) – Uranium Mill Tailings Radiation Control Act of 1978, as amended. Requiring Nuclear Regulatory Commission to grant right of first refusal for use of land to person who transferred such land to the Commission should Commission determine that use of the land would not endanger the public health, safety, welfare, or environment.

20. 42 U.S.C. §3025(b)(5)(B) – Older Americans Act of 1965, as amended. Requiring State agency to give right of first refusal to unit of general purpose local government whenever a State agency designates a new area agency on aging.

21. 42 U.S.C. §12705b – Removal of Regulatory Barriers to Affordable Housing Act of 1992. Stating that policies that have served to create or preserve, or that can be shown to create or preserve, housing for low- and very low-income families, such as rights of first refusal, shall not be construed as "regulatory barriers to affordable housing."

22. 43 U.S.C. §1314(b) – Submerged Lands Act. Granting United States a right of first refusal, in time of war or when necessary for national defense, in all natural

resources and submerged lands which are owned by States or others.

23. 43 U.S.C. §1341(b) – Submerged Lands Act. Granting United States right of first refusal, in time of war or when President shall so prescribe, to purchase at market price "all or any portion of any mineral produced from the outer Continental Shelf."

24. 43 U.S.C. §1621(g) – Alaska Native Claims Settlement Act, as amended. Granting United States a right of first refusal to purchase land in the National Wildlife Refuge System owned by any Village Corporation.

25. 43 U.S.C. §1722(a) – Federal Land Policy and Management Act of 1976. Requiring Secretary of the Interior to grant right of first refusal to contiguous landowners in public lands subject to unintentional trespass.

26. 49 U.S.C. §10910(h) – Staggers Rail Act of 1980. Requiring railroad that purchased a railroad line from another carrier to offer a right of first refusal to carrier that originally sold the line before purchasing railroad may sell or abandon all or any portion of the railroad line.

(2)

No. 94-1150

Supreme Court, U.S.
FILED
JAN 26 1995
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

OCTOBER TERM, 1994

**ALSTON R. KEENER,**
*Petitioner,*

v.

**EXXON COMPANY, U.S.A., and EXXON CORPORATION,**
*Respondents.*

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

This case concerns the nonrenewal of petitioner's gasoline station lease and franchise. That franchise nonrenewal was governed by the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (1994) ("PMPA"). The PMPA permits nonrenewals in a wide variety of circumstances, including those in which the franchisor decides to sell the gasoline station property the franchisee leases from the franchisor and then extends to the franchisee a right of first refusal of a third party's offer to purchase the gasoline station property. This case presents a single legal question:

Did the Fourth Circuit properly conclude, as other circuit courts have previously concluded, that a valid right of first refusal under the PMPA is extended when the franchisor offers to sell the leased gasoline station property to the franchisee at the identical price bid by another person for that same gasoline station property?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

RULE 29.1 STATEMENT ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

STATEMENT OF THE CASE ..... 1

A. Introduction ..... 1

B. Factual Background ..... 2

C. Procedural History ..... 5

MISSTATEMENTS IN THE PETITION ..... 7

REASONS FOR DENYING THE WRIT ..... 9

I. THE FOURTH CIRCUIT DID NOT CREATE AN IMPERMISSIBLE PRESUMPTION OF FRANCHISOR COMPLIANCE WITH THE PETROLEUM MARKETING PRACTICES ACT ..... 11

A. The Fourth Circuit Properly Ruled That Under The Petroleum Marketing Practices Act There Is a Presumption That A Valid Right Of First Refusal Is Extended When The Franchisor Offers To Sell To The Franchisee The Same Property At The Same Price Bid By A Third Party ..... 11

B. Keener Misreads The Fourth Circuit's Opinion As Creating A Presumption That Obviates The Need For Proof That The Property Offered For Sale To The

Franchisee Was The Same Property Bid Upon By The Third Party ..... 17

II. THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT COURT OF APPEALS ..... 19

A. The Circuit Courts Of Appeals Have Ruled That A "Same Property, Same Price" Offer Is A Valid Right Of First Refusal ..... 20

1. The Fourth Circuit ..... 20

2. The Second and Ninth Circuits ..... 20

B. Keener's Evidence Was Insufficient To Create A Genuine Issue Of Fact About Whether He Received A "Same Property, Same Price" Offer ..... 21

CONCLUSION ..... 23

## TABLE OF AUTHORITIES

### CASES

PAGE(S)

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) ..... 17

*Atlantic Avenue Oil & Gas Ltd. v. Texaco Refining & Marketing, Inc.*, 699 F. Supp. 27 (E.D.N.Y. 1988), *aff'd*, 870 F.2d 93 (2d Cir. 1989) ..... 21

*Darling v. Mobil Oil Corp.*, 864 F.2d 981 (2d Cir. 1989) ..... 12

*Ellis v. Mobil Oil Corp.*, 969 F.2d 784 (9th Cir. 1992) ..... 21

*Humboldt Oil Co. v. Exxon Co.*, 695 F.2d 386 (9th Cir. 1982) ..... 12

*Massey v. Exxon Corp.*, 942 F.2d 340 (6th Cir. 1992) ..... 12

*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) ..... 17

*O'Shea v. Amoco Oil Co.*, 886 F.2d 584 (3d Cir. 1989) ..... 12

### STATUTES

*Petroleum Marketing Practices Act*, 15 U.S.C. §§ 2801 *et seq* ..... 9, 11

15 U.S.C. § 2802(b)(3)(D) (1994) ..... 13

15 U.S.C. § 2802(b)(3)(D)(iii)(II) (1994) ..... 6

15 U.S.C. § 2805(c) (1994) ..... 18

### RULES

Fed. R. Civ. P. 56 ..... 10, 15

Fed. R. Civ. P. 56(f) ..... 6

**LEGISLATIVE MATERIALS**

Senate Report No. 731, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873 ..... 12

No. 94-1150

In The

# Supreme Court of the United States

OCTOBER TERM, 1994

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**EXXON COMPANY, U.S.A., and EXXON CORPORATION,**
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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## STATEMENT OF THE CASE

### A. Introduction

This is a simple gasoline service station nonrenewal case. It concerns the nonrenewal of a franchise relationship whereby petitioner Keener had leased and operated an Exxon-owned service station. Keener asserts that, when

Exxon nonrenewed its franchise relationship with him and sold the service station it formerly had leased to him, Exxon did not give him a right of first refusal in compliance with the PMPA. Keener's contention has been rejected by both the district court and the Fourth Circuit. There are no issues to be reviewed by the Supreme Court. The petition should be denied.

**B. Factual Background**

In 1984, Exxon selected and purchased a corner lot on a busy commercial street near an interstate highway interchange in the Sabraton section of Morgantown, West Virginia. (Fourth Circuit Appendix ("CA4 App.") 57.) It built a new gasoline station upon that lot. After the station was built, Keener leased the station from Exxon and became the Exxon franchisee at the station. *(Id.)* The station was successful; it was located in a high-traffic area, had a modern facility built by Exxon, and had a high volume of gasoline sales. (CA4 App. 58.) Keener's sole financial obligations to Exxon were to pay monthly rent and to pay for the gasoline and other products he purchased from Exxon. *(Id.)* Keener paid no franchise fee to become an Exxon dealer at the station. *(Id.)*

Subsequently, Exxon decided to sell the Sabraton station premises as part of its business decision to distribute motor fuel in certain markets, including parts of West Virginia, through independent distributors rather than serving those markets using an Exxon-owned distribution system. (CA4 App. 452-57; 459-60; 484-85; 489-90; 511-14.) Exxon's business decision was made in order to serve those markets more efficiently and thus increase Exxon's ability to compete in those markets. *(Id.)*

In accordance with its decision, Exxon notified Keener that Exxon would not renew the franchise relationship. (CA4 App. 58-59; 242; 247.) Exxon solicited

bids for the station from six potential purchasers. While the bid solicitations were in the hands of the potential bidders, Keener started a bidding war over the Sabraton station premises by attempting to intimidate potential bidders. Prior to the submission of bids, he sent each of the potential bidders a letter that stated: "I fully intend to buy my store. Any bid over the appraisal price only runs up the price of my goal to own my business lock, stock and barrel." (CA4 App. 510.)

Three of the potential bidders, each of whom was an Exxon distributor, submitted bids. As part of its bid solicitation, Exxon informed potential purchasers that (1) the minimum bid acceptable to Exxon was $547,000, and (2) they would have to grant Exxon an option to repurchase the station if, during the first twenty-one years after the sale, Exxon-brand motor fuel was no longer offered for sale at the station. *(Id.)* Joe DeFazio Oil Company ("DeFazio") submitted a bid totalling $1,200,010 for the service station premises. (CA4 App. 60; 175.) This was the highest bid received by Exxon in the competitive bid process. (CA4 App. 60.)

Exxon offered Keener a sixty-day right of first refusal to buy the station premises pursuant to Section 2802(b)(3)(D)(iii)(II) of the PMPA. (CA4 App. 60-61; 242-43; 250-65.) The right of first refusal offered the station to Keener on terms identical to those offered by the highest bidder to purchase the station. (CA4 App. 107-137.) As the district court found, "Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio." (App. to Pet. for Cert. 21a)(emphasis added). In addition, Keener was given the choice of not providing Exxon with a repurchase option in the event Keener decided to stop selling Exxon gasoline at the station during the first twenty-one years after the purchase of the station. (CA4 App. 60-61; 242-43; 250-65.) Accordingly, as found by the district court, "[t]he deal

offered to Keener was thus more advantageous to Keener." (App. to Pet. for Cert. 22a.)

Even though Exxon was nonrenewing its direct-served franchise with Keener, he still had the option of continuing to purchase Exxon-branded motor fuel from any of the six Exxon-branded distributors serving the Morgantown, West Virginia area. (CA4 App. 292.) An agreement with any of those distributors would have enabled Keener to retain and display the Exxon brand. (*See* CA4 App. 268-69; 282; 285.) Keener negotiated a deal with at least two of those distributors to supply him with Exxon-brand gasoline if he bought the Sabraton station. (CA4 App. 282-84; 285-86.)

The district court expressly found that "the undisputed evidence shows that Keener could have operated the station as an Exxon station, though not as an Exxon franchisee himself, for at least the same costs he incurred as a franchisee." (App. to Pet. for Cert. 23a.) Despite being able to retain the Exxon brand and operate the station as an Exxon station, the district court found that "Keener elected not to exercise his right of first refusal and not to match the highest bid for the station." (*Id.*)

After Keener declined the right of first refusal to purchase the station, Exxon proceeded to sell the station premises. (C.A.4 App. 61; 176.) The sale closed on October 2, 1992. (*Id.*) As the real estate documents make clear, this transaction was a sale of realty and equipment. In exchange for $1,142,819, Exxon conveyed by special warranty deed a service station building and the improvements and a certain tract of land. (CA4 App. 61-62; 176-77.) In exchange for $57,111, Exxon also conveyed certain equipment at the station. (*Id.*) The service station equipment included an air compressor, lifts, pumps, and underground gasoline storage tanks. (*Id.*) No part of the purchase price of $1,200,010 was for the purchase of an Exxon franchise or the payment of any franchise fee or a gasoline supply commitment. (*Id.*) Exxon

did not sell the right to purchase Exxon-brand motor fuel. Exxon sold only the land, building and equipment described in the real estate documents. (CA4 App. 61-62; 121-73; 176-77; 204-39.)

### C. Procedural History

Keener commenced this case in October 1992 in the Circuit Court of Monongalia County, West Virginia. Although Keener knew in advance that the sale of the service station premises was scheduled to close on October 1, 1992 (CA4 App. 54), he did not attempt to enjoin the sale. (CA4 App. 55-56.) It was not until after the purchase of the station premises had been consummated that Keener served his complaint on Exxon. The case was then removed to the United States District Court for the Northern District of West Virginia and transferred by consent to the District of Maryland. (CA4 App. 240.)

Keener's complaint prayed for two alternative forms of relief. Keener sought damages of $653,010 -- the difference between the purchase price of $1.2 million and his asserted "fair market value" of $547,000. (CA4 App. 54.) Alternatively, Keener sought a mandatory injunction compelling the purchaser to transfer ownership of the station to him for $547,000. (CA4 App. 54-55.) This was less than half of the $1.2 million the purchaser paid for the station as a result of competitive bidding. Keener did not seek resumption of his prior franchise relationship with Exxon.

Prior to discovery, Exxon moved for summary judgment. Keener responded by cross-moving for partial summary judgment. (CA4 App. 3.) The district court heard argument on the parties' cross-motions, but denied them both and ordered discovery to proceed. (CA4 App. 5-6.) The parties then conducted extensive discovery. All of the parties were deposed, numerous documents were

exchanged, and numerous interrogatories propounded and answered.

After the close of discovery, Exxon again moved for summary judgment. Keener again cross-moved for summary judgment. (*Id.*) Again, the parties extensively briefed their summary judgment motions. Exxon filed three briefs, and Keener filed two briefs. (CA4 App. 7-8.) Once again, Keener did not file an affidavit pursuant to Federal Rule of Civil Procedure 56(f) specifying any discovery that he claimed was necessary to enable him to oppose Exxon's summary judgment motion. Instead, he asserted that no genuine issues of material fact remained in the case. (Mem. in Opp. to Exxon's Mot. for Summ. Judg. and in Supp. of Keener's Cross-Mot. for Part. Summ. Judg. (filed on Nov. 8, 1993) at 2.)

The district court entered an order granting Exxon's motion for summary judgment and denying Keener's cross-motion for summary judgment. That order was supported by a seven-page memorandum, in which the district court properly concluded that Exxon fully complied with the PMPA when it nonrenewed its franchise relationship with Keener. (App. to Pet. for Cert. 17a-23a.) Specifically, the district court concluded that after "Exxon decided to sell the station and DeFazio submitted the highest of six bids," Keener received a "legitimate right of refusal under §2802(b)(3)(D)(iii)(II), which he elected not to exercise." (App. to Pet. for Cert. 21a, 23a.)

The district court also properly rejected Keener's argument that the PMPA precludes a franchisor from offering to sell its service station properties to the franchisor's distributors, and then providing the incumbent dealer with a right of first refusal of the high bid received. (App. to Pet. for Cert. 22a.) In rejecting this argument, the district court expressly found that "[t]here is nothing in the language of the PMPA suggesting that such an argument is meritorious." (App. to Pet. for Cert. 22a.) In addition, the

district court correctly ruled that Keener's position "is also contrary to the PMPA's purpose" which was to provide franchisors with "flexibility to improve efficiency through restructuring." (App. to Pet. for Cert. 22a.)

Keener then appealed to the Fourth Circuit, arguing that DeFazio had bid on a "bundle" of rights containing (1) title to the service station, (2) the right to use Exxon's trademark at the station, and (3) a guaranteed gasoline supply for the station. In a thorough opinion, the Fourth Circuit rejected his arguments. Specifically, the Fourth Circuit ruled that Exxon had produced evidence showing that it had offered to sell the service station property to Keener at the same price DeFazio had offered for it. (App. to Pet. for Cert. at 8a-9a.) Keener, on the other hand, failed to produce evidence sufficient to create a genuine issue of fact about whether Exxon had sold DeFazio a franchise and a gasoline commitment along with the station property. (App. to Pet. for Cert. at 9a-11a.)

## MISSTATEMENTS IN THE PETITION

Keener's petition is wholly dependent upon two major misstatements. In accordance with Supreme Court Rule 15.1, Exxon notes these two major misstatements:

1. Keener continues to assert in this Court, as he did in the courts below, the erroneous factual proposition that the property covered by the right of first refusal extended to him was different from the property the third party (DeFazio) bid upon. Specifically, Keener contends that the right of first refusal extended to him covered only the service station premises, but that DeFazio bid upon, and Exxon sold to DeFazio, a "package" consisting of the service station premises, a gasoline supply commitment, and the right to use the Exxon trademark. (*E.g.*, Pet. for Cert. 5-7.) This factual contention is unsupported and incorrect.

Both the district court and the circuit court carefully considered and rejected this factual contention, finding that Keener was offered an opportunity to purchase the same property upon which DeFazio bid. The district court ruled that Exxon's right of first refusal complied with the PMPA because "Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio." (App. to Pet. for Cert. 21a-22a.) Similarly, the circuit court affirmed the district court's finding that Keener "had, in fact, been offered the opportunity to purchase Exxon's interest in the property on the same terms as DeFazio." (App. to Pet. for Cert. 5a.) Both courts considered and rejected Keener's "package" assertion, concluding that it was unsupported by evidence sufficient to create a genuine issue of fact. (App. to Pet. for Cert. 9a-13a.)

2. Keener also erroneously contends that the Fourth Circuit ruled that "the PMPA's obligation to extend a right of first refusal is presumptively satisfied so long as the price term of the offer to sell the premises to the franchisee is the same as the price term contained in a third party's bid, even where, as here, the third party's bid covers items in addition to the premises." (*E.g.*, Pet. for Cert. 13.) In other words, Keener misconstrues the Fourth Circuit's ruling to mean that a "same price" right of first refusal is presumptively also a "same property" right of first refusal.

Keener's construction is erroneous; the Fourth Circuit made clear that there was a presumption that Exxon had extended a valid right of first refusal to Keener not merely because the price terms of the two offers were the same, but also because both offers concerned the sale of the same property. Indeed, the Fourth Circuit specifically stated that: "[a]s a matter of basic logic, a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by the third party." (App. to Pet. for Cert. 9a, n.3) (emphasis added). It further clearly stated that there exists "a

presumption of statutory compliance where Exxon offered the same station for the same price." (App. to Pet. for Cert. 8a) (emphasis added).

In short, the presumption of statutory compliance adopted by the Fourth Circuit fully recognizes that there must be a "same price, same property" right of first refusal to satisfy the requirements of the PMPA. The presumption thus properly informs the district courts and franchisors in the marketplace what evidence is necessary to meet the burden of going forward to show that a valid right of first refusal was extended.

## REASONS FOR DENYING THE WRIT

This is a simple dealer nonrenewal case in which petitioner Keener, a former Exxon franchisee, asserts that Exxon did not give him a right of first refusal in compliance with the Petroleum Marketing Practices Act, 15 U.S.C. §§2801 *et seq.* ("PMPA"). Keener's assertion is meritless and was flatly rejected by both courts below. Likewise, no basis for certiorari exists and his petition should be denied.

On cross-motions for summary judgment, the district court held that Exxon had offered Keener a valid right of first refusal, which Keener chose to reject. On appeal, the Fourth Circuit found that Exxon had extended to Keener a valid right of first refusal and affirmed the district court's judgment. Both tribunals found the material facts undisputed. Before the station was sold to the highest bidder, Exxon had offered Keener a right of first refusal to match the highest bid Exxon received. Accordingly, both tribunals held that the nonrenewal of the franchise and the sale of the station premises were proper and lawful, and that the PMPA did not entitle Keener to the windfall he sought.

Both the district court and the Fourth Circuit found that Exxon demonstrated that there was no genuine issue

that Exxon had offered to sell to Keener exactly what the highest bidder had offered to buy from Exxon -- the service station premises -- at exactly the same price that the highest bidder had offered -- $1.2 million. Both the district court and the court of appeals found that Keener had failed to introduce evidence sufficient to raise a triable issue under Rule 56, Fed. R. Civ. P., about whether the offers were the same. Accordingly, summary judgment was properly granted and affirmed.

Keener's petition for certiorari lacks merit. Having failed to convince two separate tribunals that the offers were different, he now ignores their findings. His petition merely assumes that the offers were different, which is a critical fact he failed to establish below. Keener then asserts that, because the offers were different, the Fourth Circuit in order to affirm summary judgment for Exxon created a "'strong presumption' that a right of first refusal is extended anytime the offering prices are the same." (Pet. for Cert. 14.) From this unsupported premise, petitioner then argues that the Fourth Circuit's decision creates a circuit split and contradicts the intent of Congress in the PMPA. (*E.g.*, Pet. for Cert. 18.)

Keener's petition is fatally flawed because his fundamental factual premise -- that the offers were different -- has no basis. It simply ignores the finding of both the district court and the Fourth Circuit that the right of first refusal extended to him was the same as DeFazio's offer to Exxon. The district court ruled that Exxon's right of first refusal complied with the PMPA because "Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio." (App. to Pet. for Cert. 21a-22a.) Similarly, the circuit court affirmed the district court's finding that Keener "had, in fact, been offered the opportunity to purchase Exxon's interest in the property on the same terms as DeFazio." (App. to Pet. for Cert. 5a.)

Keener's fundamental legal premise -- that the Fourth Circuit created a "'strong presumption' that a right of first refusal is extended anytime the offering prices are the same" (Pet. for Cert. 14) -- is also flatly wrong. The Fourth Circuit stated that there exists "a presumption of statutory compliance where Exxon offered the same station for the same price." (App. to Pet. for Cert. 8a) (emphasis added). Indeed, the Fourth Circuit further emphasized that "[a]s a matter of basic logic, a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by the third party." (App. to Pet. for Cert. 9a, n.3) (emphasis added).

In short, the Fourth Circuit created neither an impermissible statutory presumption nor a conflict in the circuit courts. Keener seeks review by this Court by misreading the Fourth Circuit's opinion and ignoring the undisputed facts. No basis for certiorari exists. His petition should be denied.

## I. THE FOURTH CIRCUIT DID NOT CREATE AN IMPERMISSIBLE PRESUMPTION OF FRANCHISOR COMPLIANCE WITH THE PETROLEUM MARKETING PRACTICES ACT

### A. The Fourth Circuit Properly Ruled That Under The Petroleum Marketing Practices Act There Is a Presumption That A Valid Right Of First Refusal Is Extended When The Franchisor Offers To Sell To The Franchisee The Same Property At The Same Price Bid By A Third Party

This is a service station dealer nonrenewal case. The sole legal issue presented below was whether Exxon followed the procedure set forth in the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* ("PMPA"), when a franchisor decides to sell a service station premises which it

owns. Both the district court and the Fourth Circuit correctly concluded that Keener was accorded the statutory rights given to him by Congress under the PMPA. There is no merit to Keener's contention that the court of appeals created a presumption that contradicts the PMPA's statutory allocation of the burden of going forward with evidence.

In enacting the PMPA, Congress struck a balance between the interests of franchisees and franchisors. Congress elected not to provide franchisees with complete protection against termination or nonrenewal. As stated by several federal appellate courts, the PMPA "does not provide a franchise with total protection against termination." *E.g., Humboldt Oil Co. v. Exxon Co.*, 695 F.2d 386, 389 (9th Cir. 1982). The cases and legislative history make clear that the PMPA's purpose was to "strike a balance between the at times conflicting interests" of the franchisee and franchisor and allow the franchisor to meet changing circumstances in the marketplace. S. Rep. No. 731, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874.

Congress specifically noted that "[p]articularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* at 19, 1978 U.S.C.C.A.N. at 877. In accordance with these concerns, Congress directed courts not to second-guess franchisors' marketing decisions. *E.g., Massey v. Exxon Corp.*, 942 F.2d 340, 345 (6th Cir. 1991) (Congress intended the PMPA to "avoid judicial scrutiny of the business judgment" of the franchisor and thus it is not necessary for the courts to determine whether "a particular marketing strategy" is a "wise business decision"); *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 588 (3d Cir. 1989) ("The PMPA is not designed to eliminate the petroleum companies' ability to set their own marketing strategies"; instead, "the PMPA is designed to accord flexibility to the petroleum companies to

refine their marketing strategies and change them in response to changed conditions."); *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 984 (2d Cir. 1989) (PMPA is designed "to enable the franchisor to respond effectively to changing market conditions in a given geographic region.").

The PMPA therefore sets forth certain grounds under which termination or nonrenewal is proper. At issue here was Section 2802(b)(3)(D) of the PMPA, which permits nonrenewal where, as here, two conditions are met. First, the franchisor makes a decision in good faith and in the normal course of business to sell the service station premises. Keener does not challenge Exxon's decision to sell the station. Second, the franchisor offers the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase the service station premises.

The undisputed facts demonstrate that Exxon fully complied with this provision of the PMPA. In 1991, Exxon decided that under current market conditions it could more efficiently distribute motor fuel in certain markets, including parts of West Virginia, through independent distributors rather than serving those markets directly itself. Implementation of that business decision required Exxon to sell a number of service stations, including a very successful station which Exxon leased to Keener. Exxon provided Keener with a notice of nonrenewal and informed him that he would be given a right of first refusal as provided by the PMPA. In connection with the nonrenewal, Exxon requested six potential purchasers, all of whom were Exxon distributors, to bid on the station premises. DeFazio submitted the highest bid, which was for $1.2 million. In accordance with the PMPA, Exxon gave Keener an opportunity to match that bid. Keener decided not to do so. Accordingly, Exxon sold the station to the highest bidder. Keener then sought a windfall in court: he filed suit seeking to force the sale of the station to him for $547,000 -- less than one-half of the station's purchase price as determined in the competitive bidding process.

Both Exxon and Keener filed motions for summary judgment in the district court. Both parties argued that there was no genuine issue of material fact and that the issue of Exxon's compliance with the PMPA should be decided as a question of law. The district court held that Exxon had offered Keener a valid right of first refusal, which Keener chose to reject. (App. to Pet. for Cert. 21a-23a.) On appeal, the Fourth Circuit found that Exxon had extended to Keener a valid right of first refusal and affirmed the district court's judgment. (App. to Pet. for Cert. 5a, 8a-13a.)

Both tribunals found the material facts undisputed. Before the station was sold to the highest bidder, Exxon had offered Keener a right of first refusal to match the highest bid Exxon received. Both the district court and the court of appeals found that Exxon had demonstrated that there was no genuine issue that Exxon had offered to sell to Keener exactly what the highest bidder had offered to buy from Exxon -- the service station premises -- at exactly the same price that the highest bidder had offered -- $1.2 million. The Fourth Circuit expressly found, as did the district court (App. to Pet. for Cert. 21a), that the right of first refusal extended by Exxon to Keener was identical to the offer made by DeFazio to Exxon:

- "the franchisor . . . offered the franchisee the station at the same price bid by a third party." (App. to Pet. for Cert. 3a.)

- "the district court found that [Keener] had, in fact, been offered the opportunity to purchase Exxon's interest in the

property on the same terms as DeFazio." (App. to Pet. for Cert. 5a.)[1]

Both the district court and the court of appeals found that Keener had failed to introduce evidence sufficient to raise a triable issue under Rule 56, Fed. R. Civ. P., about whether the offers were the same. (App. to Pet. for Cert. 21a-23a (no factual issues in dispute) (district court opinion); App. to Pet. for Cert. 13a ("Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision.") (Fourth Circuit opinion).) Accordingly, summary judgment was properly granted and affirmed.

In the Fourth Circuit, Keener presented a legal argument that the PMPA required more than an identity between the terms of Exxon's right of first refusal and the terms of the third party's offer. According to Keener, the PMPA requires an economic analysis to ensure that the right of first refusal is the "economic equivalent" -- a term notably absent from the PMPA -- of the third party's offer. Keener contended that Exxon's right of first refusal was not the "economic equivalent" of DeFazio's bid because DeFazio, as an Exxon distributor, had an economic advantage over him. In effect, Keener sought to prohibit the sale of service stations to distributors -- a prohibition not found in the PMPA. The Fourth Circuit (as did the district court below) rejected Keener's unfounded argument, stating that "the PMPA does not prohibit the sale of stations to distributors, and federal courts are not in the business of equalizing all advantages on the market's playing field." (App. to Pet. for Cert. 10a.)

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[1] The sole difference between the two offers is that Keener was given the choice of not providing Exxon with an option to repurchase the station. (App. to Pet. for Cert. 4a-5a.) That difference, the district court found, made the terms of the offer to Keener more advantageous than the bid by DeFazio Oil. (*Id.* 5a.)

The Fourth Circuit concluded that Exxon had complied with the PMPA, reasoning that "a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by a third party." (App. to Pet. for Cert. 9a, n.3.) Accordingly, the Fourth Circuit held that where, as here, a franchisor extends to a franchisee a right of first refusal to purchase "the same station for the same price" as bid by the third party, a presumption of statutory compliance exists. (App. to Pet. for Cert. 8a.)

The Fourth Circuit's presumption properly recognizes that there must be a "same price, same property" right of first refusal to satisfy the statutory requirements of the PMPA. The presumption of statutory compliance adopted by the Fourth Circuit correctly relieves franchisors (like Exxon) of the extraordinary burden not intended by Congress of proving that the right of first refusal is the "economic equivalent" of the third party's bid. The presumption likewise makes it unnecessary for district courts to bear the burden of supervising the sort of detailed economic analysis sought by Keener. Such analysis would have the deleterious effects of intruding on business operations, prolonging litigation, and requiring courts to second-guess private sector business decisions. (App. to Pet. for Cert. 6a-7a.) Congress did not intend for the PMPA to have such results.

In addition, the Fourth Circuit held that Keener failed to show a genuine issue of fact sufficient to overcome the presumption that Exxon's "same price, same property" right of first refusal complied with the PMPA. (App. to Pet. for Cert. 13a.) Keener contended, without basis, that Exxon sold DeFazio both a gasoline supply commitment and the station premises, but that Exxon offered him only the opportunity to buy the station. (App. to Pet. for Cert. 9a-10a.) The Fourth Circuit (and the district court) properly rejected the arguments Keener offered in support of this contention. Summary judgment was granted in the district court --

which did not apply a presumption -- because there was no genuine issue of material fact and Exxon was entitled to judgment as a matter of law. Keener, who cross-moved for summary judgment, failed to introduce sufficient evidence to raise a genuine issue of fact about the identity of the terms of the third-party offer and the right of first refusal. (App. to Pet. for Cert. 21a-23a) ("no factual issues are in dispute and Exxon is entitled to summary judgment as a matter of law."). Summary judgment was affirmed because Keener again failed to identify any genuine issue of material fact. (App. to Pet. for Cert. 13a) ("Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision.")

The Fourth Circuit (as did the district court) carefully considered Keener's factual showing, which the Fourth Circuit classified as "minimal." Both courts properly concluded that it was insufficient to avoid summary judgment. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) ("If the [opponent's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (to avoid summary judgment, opponent must do more than "simply show that there is some metaphysical doubt about the material facts").

### B. Keener Misreads The Fourth Circuit's Opinion As Creating A Presumption That Obviates The Need For Proof That The Property Offered For Sale To The Franchisee Was The Same Property Bid Upon By The Third Party

According to Keener, the Fourth Circuit ruled that, if the right of first refusal's price term was the same as the price term of the third party's offer, then the property offered for sale to the franchisee must be presumed to be the

same as the property upon which the third party bid. (*E.g.*, Pet. for Cert. 14.) In other words, Keener asserts that the Fourth Circuit ruled that a "same price" offer is presumptively also a "same property" offer, thus excusing the franchisor from introducing proof that it extended a "same property, same price" offer to the franchisee. (*Id.*) Keener's assertion is totally unfounded and distorts the Fourth Circuit's opinion.

Contrary to what Keener is telling this Court, the Fourth Circuit actually ruled that if "the same property is offered the franchisee at the identical price bid by a third party," then "a valid right of first refusal would seem presumptively extended." (App. to Pet. for Cert. 9a, n.3) (emphasis added). Indeed, the Fourth Circuit, as did the district court, ruled that Exxon had extended to Keener a right of first refusal to purchase "the same station for the same price" bid by a third party. (App. to Pet. for Cert. 8a) (emphasis added). Thus, the Fourth Circuit ruling did not excuse Exxon from demonstrating that it had extended a "same property, same price" right of first refusal to Keener.

The Fourth Circuit's presumption of statutory compliance fully recognizes that a "same price, same property" right of first refusal must be extended to a franchisee to satisfy the requirements for a valid right of first refusal under the PMPA. Thus, the presumption properly informs the district courts and franchisors in the marketplace what evidence is necessary to meet the burden of going forward to show that a valid right of first refusal was extended to the franchisee. The presumption precludes the sort of detailed economic analysis Keener seeks to engraft onto the PMPA, which would burden franchisors and courts with exhaustive economic analysis to determine whether the third party's offer and the right of first refusal were "economic equivalents."

In another misconstruction of the Fourth Circuit's opinion, Keener also asserts that the presumption

impermissibly alters the burden of proof under the PMPA. (Pet. for Cert. 19-24.) To the contrary, the presumption does not in any way shift the burden of proof. Instead, it properly identifies the proof required on the part of a franchisor under Section 2805(c) of the PMPA of "going forward with evidence to establish as an affirmative defense" compliance with the right of first refusal provision of the PMPA. Specifically, the presumption required proof by Exxon that the price and property terms of the right of first refusal extended to Keener were the same as the price and property terms of the third party's offer to Exxon. Exxon clearly met this burden of proof. (App. to Pet. for Cert. 13a; 23a.) Keener was free to rebut this evidence, but failed to do so. (*Id.*) No basis for certiorari exists.

## II. THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT COURT OF APPEALS

To create the misimpression that there is a basis for review by this Court, Keener incorrectly asserts that the Fourth Circuit's ruling conflicts with rulings of the Ninth and Second Circuits. (Pet. for Cert. 14-18.) Specifically, Keener asserts that although the Second and Ninth Circuits require proof that the franchisee was offered an opportunity to purchase at the "same price" the "same property" bid upon by a third party, the Fourth Circuit only requires proof that the franchisee was offered an opportunity to purchase some property at the "same price" bid by the third party, regardless of whether that property was the "same property" bid upon by the third party. (*Id.*)

Keener's assertion is totally meritless. As demonstrated above, it is premised on a fundamental misreading of the Fourth Circuit's opinion. The Second, Fourth and Ninth Circuit Courts of Appeals all recognize the same rule: a "same price, same property" offer is a valid right of first refusal under the PMPA. Keener lost in the

courts below because Exxon established that it had extended a "same price, same property" offer to him, and Keener failed to adduce evidence sufficient to create a genuine issue of fact about whether the property offered for sale was the "same." The result in this case would have been the same regardless of whether this case had been brought in the Second, Fourth, or Ninth Circuits.

### A. The Circuit Courts Of Appeals Have Ruled That A "Same Property, Same Price" Offer Is A Valid Right Of First Refusal

#### 1. The Fourth Circuit

As demonstrated above, and contrary to Keener's assertion, the Fourth Circuit's ruling did not create a presumption that enabled Exxon to prevail in the absence of proof that the property it had offered to sell to Keener was the same property upon which the third party had bid. Instead, the Fourth Circuit affirmed the district court's finding that Exxon had extended to Keener a right of first refusal to purchase "the same station for the same price" bid by a third party. (App. to Pet. for Cert. 8a.) Accordingly, the Fourth Circuit concluded that Exxon had complied with the PMPA, reasoning that "a valid right of first refusal would seem presumptively extended when the same property is offered the franchise at the identical price bid by a third party." (App. to Pet. for Cert. 9a, n.3) (emphasis added). The Fourth Circuit's ruling fully recognizes that a "same price, same property" right of first refusal must be extended to a franchisee to establish a valid right of first refusal under the PMPA.

#### 2. The Second and Ninth Circuits

Both the Second and Ninth Circuits had similarly ruled that a "same property, same price" offer is a valid

right of first refusal under the PMPA. Specifically, the Ninth Circuit has ruled that

> When a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arm's length offer represents the value of the station.

*Ellis v. Mobil Oil*, 969 F.2d 784, 786 (9th Cir. 1992). Similarly, the Second Circuit has approved the statement that "[a] right of first refusal is a right to buy on the same terms offered by a third party." *Atlantic Ave. Oil & Gas v. Texaco Ref. & Mktg. Inc.*, 699 F. Supp. 27, 31 (E.D.N.Y. 1988), *aff'd*, 870 F.2d 93 (2d Cir. 1989).

In short, there is no conflict among the circuits about the meaning of the term "right of first refusal" under the PMPA. All three circuit courts of appeals which have addressed this issue have similarly concluded that a right of first refusal under the PMPA requires that the franchisor offer the franchisee an opportunity to buy the service station premises at the same price that a third party offered to pay for that same property. The Fourth Circuit's decision does not create a conflict.

### B. Keener's Evidence Was Insufficient To Create A Genuine Issue Of Fact About Whether He Received A "Same Property, Same Price" Offer

The result in this case would have been the same in the Second and Ninth Circuits as the result that obtained in the Fourth Circuit: Keener would have lost. The rule in the Second and Ninth Circuits is the same as the rule in the Fourth Circuit: a "same property, same price" offer is a valid right of first refusal under the PMPA. Under this rule, Exxon extended to Keener a valid right of first refusal. Both the district court and the Fourth Circuit found that Exxon

established evidence that Keener was given a "same property, same price" offer. (App. to Pet. for Cert. 21a-22a (district court opinion); 9a-13a (Fourth Circuit opinion).)

Keener, on the other hand, failed to adduce evidence sufficient to create a genuine issue of fact about whether the property he was offered an opportunity to purchase was the same as the property the third party offered to purchase. The court of appeals -- as did the district court -- carefully considered Keener's factual showing, which the court of appeals classified as "minimal." Both courts properly concluded that it was insufficient to avoid summary judgment. (App. to Pet. for Cert. 21a-33a) ("no factual issues are in dispute and Exxon is entitled to summary judgment as a matter of law."). Summary judgment was affirmed because Keener failed to identify any genuine issue of material fact. (App. to Pet. for Cert. 13a) ("Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision.")

In sum, there is no conflict among the circuits about what constitutes a valid right of first refusal under the PMPA. The circuits recognize the same rule: a "same property, same price" offer constitutes a valid right of first refusal under the PMPA. In this case, Exxon moved for summary judgment and adduced proof that it had extended a "same property, same price" offer to Keener. Keener failed to adduce evidence sufficient to raise a genuine issue of fact about whether the offer covered the "same property." Accordingly, summary judgment was affirmed by the Fourth Circuit, as it would have been in the Second and Ninth Circuits.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 94-1150

In the
# Supreme Court of the United States
October Term, 1994

ALSTON R. KEENER,

*Petitioner,*

v.

EXXON COMPANY, USA, and EXXON CORPORATION,

*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

## BRIEF AMICUS CURIAE OF THE MINNESOTA SERVICE STATION AND CONVENIENCE STORE ASSOCIATION; WISCONSIN AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; NORTH DAKOTA PETROLEUM MARKETERS ASSOCIATION; AND IOWA RETAIL GASOLINE AND AUTOMOTIVE TRADES ASSOCIATION IN SUPPORT OF THE PETITIONER

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## TABLE OF CONTENTS


**Page(s)**

I. STATEMENT OF INTEREST OF AMICUS CURIAE .....1

II. SUMMARY OF ARGUMENT .....3

III. ARGUMENT .....6

A. THE FOURTH CIRCUIT DECISION ERRONEOUSLY ALLOWS DISCRIMINATION BETWEEN FRANCHISEES.....6

B. A RIGHT OF FIRST REFUSAL MUST ENCOMPASS IDENTICAL TERMS OR IT BECOMES MEANINGLESS .....11

C. THE FOURTH CIRCUIT'S CREATION OF A "STRONG PRESUMPTION" IMPROPERLY REVERSES THE BURDEN OF PROOF UNDER THE PMPA.....13

IV. CONCLUSION .....15

## TABLE OF CASES


| Cases | Page(s) |
|---|---|
| *Brach v. Amoco Oil Co.*, 677 F.2d 1213 (7th Cir. 1982) | 6 |
| *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991) | 15 |
| *Ellis v. Mobil Oil Corp.*, 969 F.2d 784 (9th Cir. 1992) | 15 |
| *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987) | 15 |
| *Hilo v. Exxon Corp.*, 997 F.2d 641 (9th Cir. 1993) | 14 |
| *Keener v. Exxon Company, U.S.A.*, 32 F.3d 127 (4th Cir. 1994) | 1, 2, 9, 11, 12, 14 |
| *Roberts v. Amoco Oil Co.*, 740 F.2d 602 (1984) | 3, 4 |
| *Slatky v. Amoco Oil Co.*, 830 F.2d 476 (3rd Cir. 1987) (in banc) | 4, 5, 7, 8, 10, 13, 14 |
| *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990) | 8, 10 |

*Virginia Gasoline Marketers and Automotive Repair Association, Inc. v. Mobil Oil Corporation*, Supreme Court No. 94-1000 ..... 2

## TABLE OF STATUTES

**Page(s)**

15 U.S.C. §§2801-2806 ..... 1

15 U.S.C. §2801(1)(A) or (B) and (4) ..... 8

15 U.S.C. §2801(9) ..... 11

15 U.S.C. §2802(b)(3)(D)(i)(III) and (iii)(I) and (II) ..... 5

15 U.S.C. §2802(b)(3)(D)(iii)(I) ..... 7, 13

15 U.S.C. §2802(b)(3)(D)(iii)(II) ..... 11

15 U.S.C. §2805(c) ..... 5, 13, 14

Robinson-Patman Act ..... 8, 9

## OTHER AUTHORITIES

**Page(s)**

Brown, Franchising-A Fiduciary Relationship, 49 Tex. L. Rev. 650, 655-657 (1971) ..... 4

*Hearings on H.R. 130, Senate Subcomm. on Energy Conservation and Regulation of the Energy and Natural Resources Committee*, Publ. No. 95-61, 287 (95th Cong. 1st Sess.) (written statement of Exxon Company, U.S.A.) ..... 4, 5

H.R. 130 (95th Cong.) ..... 8

H.R. 1300 (94th Cong.) ..... 7

124 Cong. Rec. §12762 (May 5, 1978) (Statement of Sen. Durkin) ..... 3

Senate Congressional Record, May 5, 1978, S. 6998 (comments of Sen. Jackson) ..... 4

S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in [1978] U.S. Code Cong. & Ad. News 873, 874 ('Senate Report')* ..... 6

## I. STATEMENT OF INTEREST OF AMICUS CURIAE

This Amicus Curiae brief is filed on behalf of service station and automotive repair associations representing service station dealers from states in the Sixth, Seventh, and Eighth Circuits.[1] An important function of these trade associations is to represent the interests of their members on critical issues before courts, legislatures and regulatory agencies.

The judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *Keener v. Exxon Company, U.S.A.*, 32 F.3d 127 (4th Cir. 1994) is an extremely serious and negative precedent for retail service station dealers nationwide because it allows discrimination between franchisees in the non-renewal of a petroleum franchise. In reaching it's decision, the Fourth Circuit majority fails to protect the franchise service station dealer by allowing him to purchase on terms equal to the jobber, the very right that was to compensate the franchisee for the otherwise permissible loss of the franchise on business grounds. Moreover, the majority reaches its conclusion through the starkest form of judicial activism by overturning the legislative burden of proof on the franchisor to show compliance with the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§2801-2806, by creating a burden shifting "strong presumption" which is imposed upon the franchisee.

In dissent, Judge Murnaghan aptly noted that the "strong presumption," which the majority "creat[ed] out of whole cloth," impermissibly overrides the right of Petitioner, as the party opposing summary judgment, to all reasonable

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[1] The states of Minnesota, Iowa, North Dakota, Michigan and Wisconsin are represented by the Associations participating in this Amicus Curiae brief.

inferences from the evidentiary record. *Keener*, *supra*, 32 F.3d 133-4. In a nutshell, Judge Murnaghan had no trouble in understanding why the sale of a station coupled with the loss of the franchise and without a favorable gasoline supply arrangement for 1.2 million dollars did not equal the sale of the station for 1.2 million dollars plus a supply of gasoline at a favorable price plus a franchise.

There are two issues where this case has far reaching implications and merits Supreme Court review. First, can the courts create, without any legislative support, a "strong presumption" that shifts the burden of proof from the franchisor, a burden placed squarely on the franchisor by Congress in enacting the PMPA, to the franchisee? Second, will the ability to protect the value of the franchise business, when a service station dealer is faced with non-renewal, be meaningful in that the franchisee will have an opportunity to meet a right of first refusal on terms identical to those offered to a third party? The PMPA was enacted by Congress in 1978 and there have been hundreds of lower court cases decided under it; however, this Court has yet to interpret this very significant federal statute that impacts a broad area of our energy distribution.[2]

The significance of an adequate remedy upon non-renewal and the judicial creation out of whole cloth of a "strong presumption" designed to undermine the burden of proof have far reaching implications, create a split between the Circuits, and merit this Court's review.

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[2] At the time of preparation of this brief, this Court has also been asked to grant certiorari in the case entitled *Virginia Gasoline Marketers and Automotive Repair Association, Inc. v. Mobil Oil Corporation*, Supreme Court No. 94-1000, another 2 to 1 decision from the Fourth Circuit involving the issue of preemption of state regulation by the PMPA.

## II. SUMMARY OF ARGUMENT

When the PMPA was enacted in 1978, Congress had heard extensive testimony concerning the unique nature and plight of the service station retailer. By the time the PMPA was enacted, the gasoline marketing system in the United States was already well into the throes of a massive reorganization brought on, at least in part, by the oil shock crises of the early 1970's. From the oil embargo to 1978, the number of gasoline dealers in the United States declined by 35,000.[3]

Service station dealers had presented an overwhelming body of evidence which demonstrated the unique and dependent relationship they bore to the major oil companies. As a leading franchise commentator noted in 1971:

> In the Nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short-term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices.
>
> * * *
>
> It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst abuses in franchising.

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[3] 124 Cong. Rec. §12762 (May 5, 1978) (Statement of Sen. Durkin), *cited* in *Roberts v. Amoco Oil Co.*, 740 F.2d 602, 605 (8th Cir. 1984).

Brown, *Franchising-A Fiduciary Relationship*, 49 Tex. L. Rev. 650, 655-657 (1971), *cited* in *Roberts v. Amoco Oil Co.*, *supra*, 740 F.2d 604.

The nature of that dependency is not difficult to understand in light of the unique relationship service station dealers have to the major oil companies. The franchisor not only owns the trademark, but is the landlord of the property on which the dealer does business and is the exclusive supplier of the motor fuel sold.

> In short, we have an independent small businessman who must negotiate with an oil company for his trademark, the lease on his premises, and his supply of product. It is difficult to imagine a greater disparity in bargaining power in the marketplace.

Senate Congressional Record, May 5, 1978, S. 6998 (comments of Sen. Jackson). In addition, the major oil companies have vast economic power.

There is more than one item of value at a service station property. First is the value of the real estate and improvements. Second is the value of the trademark. Third is the value of the motor fuel being sold, which depends on trademark and buying price. The first three are controlled by the franchisor. The last item of value is the value of the franchise business, a value created by the franchisee but dependent upon actions of the franchisor. During the hearings leading to the passage of the PMPA, the oil companies argued cogently that they should not be responsible for damages upon lease termination and non-renewal if the reason for the termination or non-renewal was motivated by legitimate business needs. *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 481-482 (3rd Cir. 1987) (in banc). *See*, *Hearings on H.R. 130,*

*Senate Subcomm. on Energy Conservation and Regulation of the Energy and Natural Resources Committee*, Publ. No. 95-61, 287 (95th Cong. 1st Sess.) (written statement of Exxon Company, U.S.A.).

The compromise that resulted in the PMPA was that if a franchisor decided to non-renew the franchise relationship because of a decision to sell the premises, as long as the franchisor made that decision in good faith and in the normal course of business, the franchisee's only remedy would be the right to purchase the station at fair market value or meet the terms of a right of first refusal offer. 15 U.S.C. §2802(b)(3)(D)(i)(III) and (iii)(I) and (II); *Slatky, supra*, 830 F.2d 481-2. If the franchisor complies with the PMPA, the franchisee must purchase in order to preserve his business value, or lose the entire value of the franchise. In effect, the PMPA provides that the franchisee could remain as a competitor in the marketplace if he could economically justify his continued operations by meeting the terms of another offer.

At this point the Fourth Circuit's majority Opinion breaks down. Blinding itself to the obvious fact that the jobber was willing to pay more for the facility than Keener because the jobber was also getting a franchise and a favorable buying price, the Fourth Circuit majority reasoned that since some of the terms were equal, namely the total price and the real estate involved, the burden shifted to Keener to overcome the "strong presumption" that Exxon's offer complied with the PMPA.

It is on these two key points, the discrimination between franchisees in connection with the non-renewal of a service station franchise and the imposition of a "strong presumption" that overrides the burden of proof on the franchisor under 15 U.S.C. §2805(c) to prove that the franchisor has complied

with the PMPA, that this brief focuses. Amicus Curiae submit that the Fourth Circuit majority was wrong. The dissent correctly reasoned that a right of first refusal must be on the same terms and conditions in order to comply with the PMPA, and that a "strong presumption" created out of whole cloth impermissibly changes the express statutory directive that the franchisor has the burden of proof that it has complied with all aspects of the PMPA.

## III. ARGUMENT

### A. THE FOURTH CIRCUIT DECISION ERRONEOUSLY ALLOWS DISCRIMINATION BETWEEN FRANCHISEES

If there is one point on which the Congressional Record and the decisions by the lower courts agree, it is that the PMPA was designed to prevent arbitrary and discriminatory terminations and non-renewals of franchisees.

> Congress enacted the PMPA in an effort to protect 'franchisees from arbitrary or discriminatory termination or non-renewal of their franchises.'

S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in [1978] U.S. Code Cong. & Ad. News 873, 874 ('Senate Report')*. *Brach v. Amoco Oil Co.*, 677 F.2d 1213, 1216 (7th Cir. 1982).

The essence of this case is that a franchisee who is being non-renewed must pay the same price for the right to purchase the station and continue his business operations as another franchisee who is receiving a franchise and a more favorable price to purchase product.

Congress never intended that the PMPA's provision that allows a franchisor to non-renew a franchise in order to sell the property would allow the franchisor to open a bidding war between franchisees for the same property in which the non-renewed franchisee would be put at a severe economic disadvantage in responding to the purchase proposal.

Here the discrimination is in two forms. First, the buyer for this station, Joe DeFazio Oil Company ("DeFazio") is a jobber who is receiving an Exxon franchise for the station, while Keener is losing his Exxon franchise. Second, DeFazio has a guaranteed supply of Exxon gasoline at favorable "rack" prices while Keener has no guaranteed supply and if Keener can buy Exxon gasoline at all, must buy at a price above rack, since Keener's supplier would be buying at rack price.

The burden of proof is on Exxon to demonstrate that these offers are equivalent, but Exxon of course cannot. Indeed, it defies economic common sense to believe that a station which was built by Keener to a volume of 2 million gallons annually under the Exxon trademark has an equivalent value when sold without the Exxon trademark and without the favorable Exxon buying price. This would mean that Keener's franchise has no value; but by the compromise reached in Congress that led to the requirement that Keener be provided with a right of first refusal as the surrogate for damages for loss of the franchise, Congress recognized that there was value in a franchise.

In interpreting the alternate and parallel provision under 15 U.S.C. §2802(b)(3)(D)(iii)(I) that the franchisor offer a bona fide (interpreted as fair market value) price, the court in *Slatky v. Amoco Oil Company*, *supra*, 830 F.2d 481 noted that the PMPA's structure was changed from the bill pending in the 94th Congress to the bill ultimately enacted by the 95th Congress. Under H.R. 13000 (94th Cong.) the franchisor

could mitigate damages by making a bona fide offer to sell the station. In the 95th Congress, the bona fide offer became "a surrogate for damages" under H.R. 130 which became law. *Slatky v. Amoco Oil Co.*, 830 F.2d 481.

In this case, DeFazio was to receive an Exxon franchise for Keener's station if DeFazio purchased the property. DeFazio is a "jobber" who would buy at "rack" prices. DeFazio was going to operate as the retailer, just as Keener had, but DeFazio also had the dual advantages of being able to buy Exxon gasoline (1) as an Exxon franchisee (2) at Exxon's "rack" price, a lower wholesale price than paid by a dealer like Keener.[4]

There is no question that DeFazio was receiving a franchise to operate an Exxon facility at Keener's station. DeFazio was receiving a contract for the supply of motor fuel under a trademark owned by a refiner. 15 U.S.C.§2801(1)(A) or (B) and (4). Viewed simply, if Exxon was non-renewing Dealer A on the basis that Dealer A must pay the same price for the station as Dealer B being offered the same station plus the franchise, the court could easily determine that the following mathematical formula demonstrates that the franchisor has not complied with the PMPA:

(Purchase of Station) + (Franchise and Trademark) ≠
(Purchase of Station) - (Franchise and Trademark)

In that case it is easily discernable that there is a discrimination between the two franchisees in the non-renewal of the franchise since one is receiving a franchise and the other is

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[4] Compare *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990) in which the court recognized the existence of pricing disparities between jobbers and dealers in a Robinson-Patman action.

losing a franchise. In this case, however, the discrimination and differential is even greater, as shown by the following formula:

(Purchase of Station) + (Franchise and Trademark) +
(Reduced Buying Price) ≠
(Purchase of Station) - (Franchise and Trademark)

But in taking over Keener's station, DeFazio, while ostensibly a jobber, was functionally a franchise retailer like Keener had been, only with a better buying price.

The Fourth Circuit majority erred when it concluded that "whatever advantage DeFazio Oil may have had, however, resulted from its preexisting distributor relationship with Exxon . . ." *Keener, supra*, 32 F.2d 131. That assumption is untrue. DeFazio's advantage existed from the fact that Exxon was willing to give DeFazio a franchise for the Keener station, and give DeFazio the right to buy Exxon gasoline for the station at the rack price.[5] What the majority misses is that Exxon was treating DeFazio just as a franchisee dealer, namely that it was giving DeFazio the trademark and right to market gasoline at retail from Keener's station. The difference was that DeFazio was going to get a lower buying price. This form of price discrimination raises serious Robinson-Patman

[5] The majority in footnote 4 of it's decision demonstrates why the burden shifting is so egregious as to Keener. The court assumes that there is "no indication that the station sales contract in itself guaranteed DeFazio Oil a supply of Exxon gasoline." *Id*, 32 F.3d 131. This elevates conjecture over reason. Under DeFazio's station sales contract, he had to resell the station to Exxon if he ceased selling Exxon branded gasoline at any time over the next 21 years. Even in the absence of a separate supply agreement, the station sales contract between DeFazio and Exxon clearly demonstrated an intent to provide DeFazio with Exxon gasoline at the rack price.

Act implications. *Texaco Inc. v. Hasbrouck, supra*, 496 U.S. 543. The only way that Exxon can justify a lower buying price to DeFazio than to Keener is if DeFazio is providing jobber "functions" and then only a functional difference. The Fourth Circuit majority points out that Keener had an ability to secure supplies of Exxon gasoline from jobbers. The difference in buying price is self-evident since the jobber will require a profit for its services and materials.

Ultimately the decision is simple: allowing one class of franchisees the right to purchase a station and receive a more favorable buying price is discrimination in connection with non-renewal when another class of franchisees must pay the same price for the station but without the franchise and the buying price advantage when both will operate in the same functional position.

The well reasoned *in banc* decision by the Third Circuit in *Slatky v. Amoco Oil Co, supra*, applies here. If the right to purchase the station became the surrogate for damages upon loss of the franchise, then the Court must interpret the PMPA to assure that the franchisee has meaningful protection in exercising that surrogate. A right of first refusal must mean on equal terms or it becomes not a surrogate for damages, but an invitation to creative manipulation that disenfranchises service station dealers without an effective remedy. The service station dealer is not seeking to repeal the free market forces, but only seeks an equal opportunity on equal terms when entering the playing field.

## B. A RIGHT OF FIRST REFUSAL MUST ENCOMPASS IDENTICAL TERMS OR IT BECOMES MEANINGLESS

It is a fundamental premise of the law that a right of first refusal must allow and require the person receiving the right to meet the identical terms and conditions of the previous offer. A right of first refusal requires application of the "mirror image" standard, both in terms of the offer and the acceptance. Any other rule creates ambiguities in the contracting relationship, and allows one party or the other to vary the terms to its own convenience and to the detriment of the other party.

The PMPA's right of first refusal applies to the "franchisor's interest" "in the leased marketing premises." 15 U.S.C. §2802(b)(3)(D)(iii)(II). "Leased marketing premises" is defined in 15 U.S.C. §2801(9) to include "marketing premises owned, leased or in any way controlled by a franchisor . . ." In this case, Exxon was going to continue to have an interest in and control over the leased marketing premises under the DeFazio offer, since Exxon retained the right to repurchase the premises from DeFazio if DeFazio did not market Exxon motor fuel for 21 years. This meant that Exxon's interest in the leased marketing premises included the right to market Exxon gasoline through DeFazio. Exxon wasn't offering to convey to Keener the same interests in the leased marketing premises that DeFazio was to receive from Exxon.

DeFazio is receiving a franchise and DeFazio is receiving a long term gasoline supply commitment at favorable rack prices. These are items of value to DeFazio. The advantage to DeFazio did not, as the majority concludes, stem from his "preexisting distributor relationship with Exxon." *Keener*, 32

F.3d 131. Rather the advantage arose because of Exxon's willingness to extend that relationship, a franchise, to Keener's station while denying the same advantages to Keener.

Assume, since no proof on the buying differential was offered by Exxon which bore the burden of proof, that the differential in the rack price and the price at which Keener could buy Exxon gasoline was 5¢ per gallon. Even giving DeFazio the benefit of the doubt that he would only buy 1.7 million gallons per year from Exxon, pursuant to his supply arrangement,[6] the value to DeFazio would be 5¢ x 1.7 million gallons x 21 years = 1.785 million dollars. At 3¢ per gallon for 1.7 million gallons annually, the difference is 1.07 million dollars. Three cents per gallon for 2 million gallons annually is a difference of 1.26 million dollars. Reducing those amounts to present day values could easily account for the differential between the amount DeFazio was willing to pay and the fair market value of the station. Drawing reasonable inferences in Keener's favor, the station price differential was not an "unacceptable windfall" to Keener but the price differential arising from the disparity in terms between DeFazio's offer and Keener's created by Exxon. *Id*, 32 F.3d 132.

The mirror image rule, contrary to what the majority found,[7] is the simplest rule. Any other rule requires that the Court attempt to balance and weigh competing terms and their values. Requiring that Exxon offer to sell the station to Petitioner Keener on the same terms as the arrangement with DeFazio, namely the purchase price plus the franchise plus the

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[6] There is no reason to believe that DeFazio would not receive the 2 million gallons per year from Exxon that Keener had been able to sell from the station, and all these calculations assume gasoline volumes remain constant and not grow.

[7] *Keener, supra*, 32 F.3d 131.

favorable buying price, means that the Court will not have to examine other aspects of the economic arrangement.

### C. THE FOURTH CIRCUIT'S CREATION OF A "STRONG PRESUMPTION" IMPROPERLY REVERSES THE BURDEN OF PROOF UNDER THE PMPA

The Fourth Circuit has created a "strong presumption" despite absolutely no legislative support for the creation of this assumption, despite the fact that no other court has found such a presumption to exist, and despite the fact that the Fourth Circuit's position is contrary to the express requirement of the PMPA that the burden of proof is on the franchisor. 15 U.S.C. §2805(c). The decision by the Fourth Circuit majority is contrary to the parallel decision by the Third Circuit interpreting the requirements of a "bona fide" price under 15 U.S.C. §2802(b)(3)(D)(iii)(I), which is the alternative to a right of first refusal. The *Slatky* court *in banc* rejected the concept that a "bona fide offer" required only the franchisor's subjective good faith, and instead tied it to fair market value.

> As we have discussed, the overriding purpose of Title I of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship. Because of the distributor's need to adjust to changing market conditions, however, Congress permitted distributors to end the franchise relationship for legitimate business reasons. Yet in doing so, distributors still deprived franchisees of their reasonable expectations. The bona fide offer provision therefore serves as a second, and distinct, layer of protection, assuring the franchisee an

> opportunity to continue to earn a livelihood from the property while permitting the distributor to end the franchise relationship.

*Slatky v. Amoco Oil Co., supra*, 830 F.2d 484.

The *Slatky* court went on to hold that a bona fide offer requires an objectively established fair market value. In footnote 7, the *Slatky* court indicated that it was not excluding the possibility of other relevant factors, and indicated that "an offer approaching fair market value might be hedged with unreasonable conditions of sale." *Slatky*, 830 F.2d at 485, fn 7.

While the Third Circuit recognized that the terms of an offer could impact fair market value, and hence deserve scrutiny, the Fourth Circuit majority in this case not only rejected that approach, but placed the burden on the franchisee to demonstrate that the franchisor had not complied with the PMPA.[8] This approach erroneously shifts the burden of proof under the PMPA, and operates as a complete surprise to a franchisee preparing to respond to a summary judgment motion in which the franchisee has only the burden of demonstrating that there is a franchise and it is being non-renewed before the burden shifts to the franchisor. 15 U.S.C. §2805(c). If such a standard were to be adopted, it could only be applied prospectively in a summary judgment setting.

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[8]The Fourth Circuit claims "maximum economic efficiency" justifies the creation of a strong presumption. *Keener, supra*, 32 F.3d 130, 131. *Slatky* correctly reasoned that the PMPA's purpose of franchisee protection takes precedence and requires meaningful protection for the damages surrogate. The Fourth Circuit's failure to apply the principle that franchisee protection is the overriding purpose of the PMPA puts it in conflict with other circuits. *Slatky v. Amoco Oil Co.*, 830 F.2d 484 (3rd Cir. 1987) and *Hilo v. Exxon Corp.*, 997 F.2d 641 (9th Cir. 1993).

In fact, the burden was on Exxon to demonstrate that the additional terms being offered to DeFazio, namely a franchise, trademark and a reduced buying price, did not alter the value of offer to purchase the station by Petitioner Keener. Exxon made no showing that these provisions did not contribute substantial value to DeFazio in connection with DeFazio's offer.

It is extremely critical that this Court grant certiorari to reverse the unfounded attempt by the Fourth Circuit to shift the burden of proof to the franchisee, by creating a strong presumption that the same price for the same property means that the franchisor has complied with the PMPA unless the franchisee can show otherwise. Indeed, the Fourth Circuit's Opinion is expressly contrary to the Ninth Circuit decision in *Ellis v. Mobil Oil Corp.*, 969 F.2d 784 (9th Cir. 1992), the First Circuit in *Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc.*, 940 F.2d 744 (1st Cir. 1991), and the Tenth Circuit in *Ewing v. Amoco Oil Co.*, 823 F.2d 1432 (10th Cir. 1987).

## IV. CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 94 - 1150

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1994

ALSTON R. KEENER,
Petitioner

v.

EXXON COMPANY, USA, and
EXXON CORPORATION,
Respondents

---

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# AMICUS CURIAE BRIEF OF SERVICE STATION DEALERS OF AMERICA IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an irrebuttable presumption of statutory compliance may be read into the Petroleum Marketing Practices Act, 15 USC 2801 et.seq., enforcement provision, 15 USC 2805, where the language of the statute, contains no such presumption

2. Whether interpretation of the Petroleum Marketing Practices Act generally, and its "offer" provisions specifically, is guided by economic realty and market analysis, or by judicially created presumptions ?

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....ii
Table of Authorities... iii
Interest of Amicus..... 1
ARGUMENT..... 6
Background of the PMPA..7
Structure of the PMPA...13
The Offer Issues.....15
Enforcement Issues.....20
Summary and Conclusions.25

TABLE OF AUTHORITIES
CASES

Barnes v. Gulf Oil,
795 F.2d 358 (4th Cir.1986).....
7,8
824 F.2d 300 (4th Cir.1987).....
4,6,13,28
Brach v. Amoco Oil Co.,
677 F.2d 1214 (7th Cir.1982).....
24

Darling v. Mobil Oil Corp.
864 F.2d 981 (2nd Cir. 1989).....
16,18

Eastman Kodak v. Image Technical Services,
112 S.Ct. 2061 (S.Ct. 1992).....3

Ellis v. Mobil Oil Corp. ,
969 F.2d 784 (9th Cir. 1992).....32

Hilo v. Exxon Co. USA,
997 F.2d 641 (9th Cir.1993).....

30,31,32,33

J. Truett Payne v. Chrysler Motors Corp.
451 U.S. 557 (1985)..... 26,27

Reyes v. Atlantic Richfield Co.,
12 F.3rd 1464 (9th Cir. 1993).....14,27

Slatky v. Amoco Oil Co.,
830 F.2d 476 (3rd Cir. en banc 1987)....3,4,5,11,12,16,19,25,26,27

Spectrum Sports v. McQuillen
112 S.Ct. 2072 (1992).....
3

Sun Refining & Marketing Co. v. Rago,
741 F.2d 670, 673 (3rd Cir. 1984).....14,16,18,26,27,28,29

STATUTES & LEGISLATIVE HISTORY
15 USC2802(a).....13,14

15 USC 2802 (b)(1)..... 21

15 USC 2802 (b)(2).....8

15 USC 2802 (b)(3)(d)....10,14

15 USC 2802 (c).....3,,16,
17
15 USC 2805 . ..... 7

15 USC 2805 (c).....7,9,13

1978 U.S.Code Cong. & Ad. News

.....3,21,23

House Report # 100-1100..... ..22

Cong. Record
April 5, 1977
p. 10378,83....10,11,12,13

May 5, 1978 p. 12761,
62..... 6, 7

MISCELLANEOUS

Note, 32 Emory L.J.273..... 10

## INTEREST OF THE AMICUS IN HAVING THE WRIT GRANTED

The Service Station Dealers of America is a trade association that through its network of state affiliates serves as the voice of America's 50,000 gasoline retailers.

To one of the SSDA's members, rights under the PMPA generally, and the right to buy the station a dealer is leasing if the franchisor decides to sell it, specifically, is the most precious right a dealer can have. For many of our members it is the culmination of a dream - to not only have his or her own business, but to own the station real estate as well.

In order to ensure that right, the SSDA has been at the forefront of each of the leading PMPA cases

construing the PMPA's "offer" provisions.

The nation's major oil companies ares selling off properties in droves, driven primarily by environmental considerations, and a desire to focus marketing in geographic areas where there already exists significant penetration.

For example, Exxon has reduced its number of lessee dealers by over 20% in the last two years alone.

Under the PMPA, when Exxon decides to sell a station property, it must either make a bona fide offer to sell what the statute calls "its interests in the leased marketing premises"; or allow the dealer the right of first refusal with respect to

such an offer made by another.

In this case, Exxon solicited bids from branded distributors known as "jobbers", in this case, DeFazio Oil Company.

Exxon provides its distributors with a number of benefits, that it does not make available to dealers such as Petitioner. These include financing for station and upgrades through a program called "Tiger Mac"; and lower wholesale fuel costs known in the industry as "rack prices".

Another economic effect of the challenged practice is that Keener and similarly situated franchisees will be forced to pay a premium in the form of goodwill or business value created by their own labor, a premium above the

fair market value of the "franchisors interest in the leased marketing premises" , i.e. the value of the land, which is what the plain language of the statute requires the franchisor to offer the franchisee.

In a nutshell, the majority of the 4th Circuit panel would simply eschew any economic analysis; avoiding such analysis by creating a presumption of franchisor compliance with the statute; that is nowhere to be found in the language or even in the legislative history.

The 4th Circuit ruling is in conflict with that of other Circuits which have consistently held that any offer based in whole or in part on the dealers' goodwill is not bona fide as

a matter of law and thus violates the PMPA. See, e.g., Ellis v. Mobil Oil Corp., 969 F.2d 784, @ 788 (9th Cir. 1992).

The PMPA is unique because it shifts the burden of proof to the franchisor; and uses a relaxed standard for injunctive relief that does away with the requirement that the franchisee show either irreparable harm or a probability of success on the merits.

As demonstrated infra, the panel majority of the 4th Circuit would turn the statute on its head, by creating a strong, indeed irrebuttable presumption of statutory compliance.

The panel majority did precisely what the Court warned in J.Truett

Payne v. Chrysler Motors Corp., 451 U.S. 557; 101 S.Ct. 1923 (1981) should not be done: judicially engrafting onto a statute what Congress refused to do.

The legislative history shows that oil companies generally; and Exxon specifically, strongly protested the decision of Congress' decision to shift the burden of proof to the franchisor.

The net effect of the action of the panel majority is to return the burden of showing statutory non-compliance to the small dealer, a burden Congress relieved dealers of for a variety of reasons, including the disparity of resources with respect to the international oil

giants, the same reasons that produced the unique injunction standard.

In addition, the SSDA is concerned because the opinion of under review creates far more conflict within the Circuits than that set forth in the Petition.

In addition to the 2nd and 9th Circuits as set forth in the petition, the decision under review conflicts with decisions of the 3rd, 8th and 10th Circuits with respect to the proper level of scrutiny of oil company offers.

The fundamental reason why this conflict exists is that the panel majority chose to characterize Exxon determination of an offer price as "sound business judgment that should

not become a casualty of constant judicial oversight."

The critical distinction missed by the panel majority is that the decision to sell the property and the offer are scrutinized under different standards, a distinction carried over in the enforcement provisions.

" The determination of an offer price therefore represents something we may call a "compliance judgment", a judgment about how to best protect the company's interests while complying with the statute. CONGRESS DID NOT INSTRUCT THE COURTS TO DEFER TO SUCH DECISIONS."

Slatky v. Amoco Oil Co. 830 F.2d 476 at 481 (3rd Cir. in banc )

Slatky has been followed by every

other Court to consider the issue.

Finally, the SSDA has long been concerned with proper interpretation of trade regulation statutes such as the antitrust laws and the PMPA. SSDA has filed a number of briefs with the Court; some of which have been cited in the opinions.

SSDA has always adhered to the position that interpretation of such statutes must be guided by economic reality, as this Court has so often stated.

This opinion is an attempt to inject into the PMPA the mode of analysis set forth in a law review article by the same author, at the expense of the language of the statute, its history and purposes,

sound economic analysis a law, and ultimately the members of the SSDA and the motoring public.

For these reasons, the SSDA urges granting the writ.

## ARGUMENT

The Court again finds itself confronted with the situation presented in Spectrum Sports Inc. v. McQuillen;____ U.S._____; where a single Circuit Court is an isle of discord in a sea of harmony; because it had elected to apply a presumption that was not based in the language of the statute, that was utterly divorced from economic reality.

In Spectrum Sports the Court reversed a line of 9th Circuit Sherman Act Section 2 attempted monopolization

cases; that allowed a party to meet its burden in proof, by applying a baseless presumption that the specific intent and dangerous probability of success elements of the Sherman Act offense were met where certain per se Section 1 violations existed irrespective of proof of the relevant market or of market power.

The majority of the 4th Circuit panel fashioned a similar presumption, out of whole cloth as correctly noted by the dissent, in order that " a simple statutory provision not be turned into a complex and cumbersome one necessitating a detailed economic analysis of private decision making." 32 F.3rd @ 130.

This Court has consistently held

that in construing a trade regulation statute such as the PMPA, economic reality is the touchstone of the analysis, and theories such as the presumption formerly applied by the 9th Circuit in Section 2 cases; and that which the 4th Circuit panel majority would apply, cannot stand. See, e.g., Eastman Kodak v. Image Technological Services, 112 S.Ct. 2072 at 2082 (legal presumptions that rest on formalistic distinctions rather than ACTUAL MARKET REALITIES ARE DISFAVORED).

The economic reality is that the offer to the Exxon distributor was not the same as that offered to Keener, for at least three reasons. First, Keener did not have a supply of Exxon

gasoline available at all, much less one at the favorable "rack" price. Second, the Exxon distributor, DeFazio, would have available favorable financing deals through Exxon, such as "TigerMac".

Third, an Exxon distributor such as DeFazio, who planned to continue to operate the facility as a gas station, and further as an Exxon station would be willing to pay a premium for the property that represents the business value or goodwill generated by the franchisee; Keener. Thus the franchisee would be forced to pay for that which or he she created. The plain language of the statute states that what the franchisor must offer to the franchisee is its interests in the

leased marketing premises: i.e. its feehold or leasehold interest. See, Ellis v. Mobil Oil Corp., 969 F.2d 781 (9th Cir. 1992).

It is difficult to believe that DeFazio would offer 1.2 million for a piece of land that appraised at less than one half that figure; without the ongoing gasoline business.

In the name of quick disposition of cases, the panel majority held that economics do not matter. This creates conflict with other Circuits; and is contrary to decisions of this Court , as well as to the language and intent of the PMPA, to which we now turn.

## I. Background of the Petroleum

**Marketing Practices Act**

" It is apparent from the legislative history [of PMPA] that Congress was responding to what it perceived as a pattern of abuse by major oil companies of their franchise relationships with petroleum retailers."

Note, Judicial Interpretation of the Petroleum Marketing Practices Act:Conflict & Diversity, 32 Emory L.Journal 273 (1983) at 274. (Hereinafter cited as Note, supra, Emory L.J.)

Oil companies such as Exxon argued that legislation regulating petroleum industry franchises was not necessary. Exxon further argued that the procedural protections provide by

the proposed PMPA; shifting the burden of proof and the relaxed injunction standard, should be deleted:

" It should impose on the franchisee as the moving party, not the franchisor, the burden of proof both at the temporary injunction level, and at a trial on the merits, as in any lawsuit." Hearings on H.R.130, Petroleum Marketing Practices Act, before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st session. [1977]: (hereinafter cited as Hearings) (Testimony of Exxon Co. USA at page 208, 214).

Exxon and others argued against the procedural PMPA protections, as

well as the passage of the statute itself, arguing that a franchisor's economic interests provided a sufficient check on abusive conduct. These arguments were rejected. Congress, as well as the Courts. Thus, as stated by the Third Circuit in the only en banc decision ever decided under PMPA:

> "[T]he very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline retailers that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony."

Slatky v. Amoco Oil Corp., 830 F.2d 476 at 483 (3rd Cir. en banc, 1987). The explicitly stated purpose of the Act was to "provide for the protection of franchised distributors and retailers of motor fuel . . . and to

prevent deterioration of competition in gasoline marketing." (123 Cong.Rec. 4/5/77, p. H10378, Statement of Rep. John Dingell (the primary author of PMPA)).

Congress specifically intended to maintain independent retailers such as Petitioner as a competitive force in the marketplace. See,e,g. Note, supra, 32 Emory L.J. 273 at 281.

This specific concern of PMPA was echoed by Senator John Durkin, Chief Senate Sponsor and Floor Manager of the PMPA:

"MR. DURKIN: ... consumers can expect an advantage from the continued service provided by these dealers and the competition they create in the gasoline marketplace . . . . `Dealer day in court', as the bill is popularly referred to, is aimed at halting the steady decline in the numbers of small businessmen who can continue to compete in the retail

gasoline marketplace." 123 Cong.Rec. 5/5/78, p. S12761-62 [Statement of Senator John Durkin]. (emphasis added).

In order to achieve this goal Congress' prohibited oil companies from making offers or requiring dealers to meet offers which are not bona fide: i.e. at prices above the fair market value of the locations; or that include the goodwill value of the business; or are hinged with unreasonable conditions of sale. See, e.g. Ellis v. Mobil Oil Corp., 969 F.2d 784 (9th Cir. 1992); Slatky v. Amoco Oil Co., 830 F.2d 476 (3rd Cir. en banc 1987).

As the 9th Circuit stated in Ellis, the bona fide offer requirement serves as a second, distinct layer of protection for franchisees, in order

that they can continue to compete in accordance with the goals of the PMPA.

The panel claims that the primary purpose of the PMPA is to ensure that decision making does not become a victim of judicial oversight; a holding that would have astonished the drafters of this decidedly interventionist statute.

Though it restricted their actions, PMPA was intended to leave franchisors with some flexibility to respond to changing market conditions.

It was not the intent of Congress to allow this flexibility to subvert the primary purpose of the Act, franchise protection:

"... to assure that franchisees nevertheless receive the meaningful

protections which this Federal legislation is intended to provide **and to assure that this flexibility does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms."** Cong. Record, p. H10383, April 5, 1977. [Statement of Chairman John Dingell, primary author of the PMPA.]

One of those "very special enforcement mechanisms" is the PMPA's shifting of the burden of proof, another is the relaxed standard for preliminary injunctive relief, USC 2805. Chairman Dingell continues:

" ... **to assure this (franchisor) flexibility does not frustrate the purposes** of this legislation, the bill uses very

special enforcement mechanisms. **The burden of proof is placed upon the franchisor to prove compliance with the requirements of this legislation. In addition, because the franchisee's rights must be preserved, pending litigation, if his ultimate victory is to be meaningful, PRELIMINARY INJUNCTIVE RELIEF IS MADE AVAILABLE TO THE FRANCHISEE AS A MATTER OF RIGHT UPON A VERY MINIMAL SHOWING."** **Cong. Record, April 5, 1977 @ p. 10383 (remarks of Chairman Dingell, author of the PMPA.)**

The enforcement provisions of the proposed PMPA were most objectionable to the oil companies.

it has consistently been held that as remedial legislation, the Act must be

given a liberal construction consistent with its goal of protecting franchisees." Id. See, Barnes v. Gulf Oil Corp., 824 F.2d 300, 306 (4th Cir. 1987).

Regrettably, what appears to be an attempt to engraft a law review article into a statute, where the concept in the article was expressly rejected by the drafters of the statute, i.e: placing the burden of proof on the franchisee; does not comport with legislative intent, creates conflict in the Circuits, and requires resolution by this Court.

III. **The Structure of the PMPA**

The principal substantive provision of the PMPA is found at 15 USC 2801 (a) - the general prohibition

of ALL terminations of franchises or non-renewal of franchise relationships.

Under Section 2805, the enforcement provision, once the franchisee shows an attempted termination or non-renewal has occurred, the burden shifts to the franchisor can prove as an affirmative defense pursuant to 15 U.S.C. 2805(c), that one of the statutorily enumerated grounds or exceptions to the rule against termination or non-renewal, (See, 15 USC 2802(b)) for non-renewal or termination do in fact exist.

Even if the franchisor shows that an affirmative defense may exist, the plain language of the statute, 15 USC 2802(b)(2)(B) shows that the

franchisor still does not prevail.

As set forth by the 9th Circuit in Reyes v. Atlantic Richfield Co., 12 F.3rd 1464 (9th Cir. 1993):

"...under the explicit language of the statute, a franchisor must not only show that there was a legitimate reason for the termination or non-renewal, he must also demonstrate that this reason was in fact the ground for the termination or non-renewal decision.

Under the PMPA the franchisee has the initial burden of proving his franchise was not renewed. 15 USC 2805(c). The burden then shifts to the franchisor to demonstrate that the non-renewal was proper under the PMPA. 15 USC 2802(b)(1)(B). The PMPA

prohibits the termination or non-renewal of any gasoline industry franchise unless "such termination is based upon a ground" described in the PMPA. 15 USC 2802(b)(1)(B).... ."

{ARCO established in that case that the franchise has failed to comply with a provision of the franchise that was both reasonable and materially significant to the franchise relationship.}

"ARCO asserts that by establishing the breach, it has satisfied its entire burden.

But under the language of the section 2802(b)(1)(B), Arco is only half done; ARCO must also establish that the "termination or non-renewal is <u>based upon</u> the breach. This second-

half of the franchisor's burden is met by introducing evidence that the non-renewal was in fact based upon the breach.

The next question is whether the franchisee is free to rebut this element of the franchisor's case by producing evidence that the termination was in fact based on an illegitimate reason. The answer is yes.

THERE IS NO PROVISION IN THE PMPA PROVIDING THAT THE FRANCHISOR'S PROOF OF THIS ELEMENT (i.e. that one of the affirmative defenses do in fact exist) C R E A T E S A N I R R E B U T T A B L E PRESUMPTION.(such as that under review herein). 12 F.3rd @ 1469, 1470.

The 4th Circuit finds a

presumption where other do not. Compare, Brach v. Amoco Oil Co., 677 F.2d 1214 (7th Circuit, 1982) (effect of PMPA is to create a presumption that all terminations are illegal).

PMPA is designed to allow lessee gasoline retailers to buy the franchisor's interests in the leased marketing premises whenever the franchisor decides to sell those interests, so that even though the franchisor may cease marketing gasoline, the franchisee will remain in business in order to provide price and service competition in the motor fuel marketplace. See, e.g., Slatky v. Amoco Oil Co 830 F.2d 476 (3rd Cir. in banc 1987)

Compliance with the offer

requirements of the PMPA requires not presumptions, but economic and factual proof that: (1) That the franchisor offer the property so as to evidence a sincere desire to sell the property, meaning that the franchisor must sincerely believe that the price term meets or very nearly approaches the fair market value of the property; See, e.g. Slatky v. Amoco, 830 F.2d at 485 (3rd Cir.in banc 1987);

(2) Even if the franchisor has such a sincere belief, the offer must be determined to be objectively reasonable, that is it must actually meet, or very nearly approach the objectively determined fair market value. Slatky, supra.

(3) The offer may not be hinged with

unreasonable conditions of sale, Slatky v. Amoco Oil Co.; 830 F.2d 476, 484 n.7.

The Fourth Circuit holding that such factual inquiry is foreclosed rests upon the failure to recognize the critical distinction between the decision by the oil company to sell its interests in the leased marketing premises; and the offer to sell such interests.

The former, the decision to sell, is evaluated under a subjective good faith standard: that is judicial scrutiny is limited to whether the decision was made in good faith and the normal course of business. All courts agree on that point.

The conflict created by the 4th

Circuit in this case through this "presumption"; extends to the 8th Circuit and 10th Circuits, as well as the in banc 3rd Circuit decision upon which it purports to rely.

Offers to sell are not voluntary business judgments made by franchisors, rather they are compliance judgments required by the plain language of the statute.

"Like a termination or non-renewal decision for franchisee misconduct, the determination of an offer price is NOT A BUSINESS DECISION. IT IS NOT A DECISION THAT THE DISTRIBUTOR DECIDES ON ITS OWN TO MAKE. RATHER THE DISTRIBUTOR SETS A BONA FIDE PRICE ONLY BECAUSE THE STATUTE REQUIRES IT TO DO SO.

Indeed, when a distributor fails to renew a franchise because of a decision to convert a property to a different use, or to alter the premises, see 2802 (b)(3)(D)(i)(I)(II), selling the property will interfere with its business plans. The determination of an offer price therefore represents something we may call a "compliance judgment", a judgment about how to best protect the company's interests while complying with the statute. CONGRESS DID NOT INSTRUCT THE COURTS TO DEFER TO SUCH DECISIONS."

Slatky v. Amoco Oil Co. 830 F.2d 476 at 481 (3rd Cir. in banc

This critical distinction recognized by the Third Circuit in

Slatky was first articulated by the Eighth Circuit in Roberts v. Amoco, 740 F.2d 602 (8th Cir. 1984), which expressly held that " the question of whether an offer is legitimate is separate and distinct from the question of whether the decision is not to renew was in "good faith and the normal course of business." Roberts, supra, 740 F.2d at 606...any general business judgments underlying the terms of the offer, such as Amoco's alleged concern for avoiding future liability or environmental damage arising from leaking underground storage tanks do not make an otherwise deficient effort bona fide. Id. @ 607.

By contrast, the majority opinion

of the 4th Circuit cites Slatky in its decision, 32 F.3rd @ 130, but then decides that the PMPA was designed to ensure that " sound business judgment does not become a casualty of constant judicial oversight " and that application of its newly discovered presumption comports with a "desire, (nowhere to be found in the statute, its legislative history, or the opinions of sister Circuits); that a simple statutory provision not be turned into a complex and cumbersome one necessitating a detailed economic analysis of private decision making."

This is nonsense. Congress fully intended that the offer terms be strictly scrutinized; and this Court has repeatedly made clear that in

construing other trade regulation statutes, such as the antitrust laws; economic reality is to be the touchstone of the analysis.

The opinion of the 4th Circuit is untenable and certiorari should be granted.

IV. ENFORCEMENT ISSUES

The plain language of the statute places a heavy burden on Exxon, and any other franchisor. The radical changes PMPA makes in both shifting of the burden of the burden of proof.

The " presumption of compliance" was, as Judge Murnaghan noted "created out of whole cloth" 32 F.3rd @ 133, - it is not to be found in the PMPA or its legislative history, and is fatally undercut by decisions such as

Slatky and Ellis upon which it purports to rely.

We have an Exxon distributor, who would have continued to operate the location as an Exxon station, thus enjoying the fruits of Mr. Keener's labor in building up the value of the Exxon brand in that location, who would have been purchasing gasoline at cheap rack prices, and who could have enjoyed financial deals, all of which were not offered to Petitioner.

For Exxon and other oil companies to meet the burden of proof imposed upon them by Congress over their objections, offers of rights of first refusal must be subject to economic analysis, not judicial legislating.

Finally we note that the 4th Circuit panel majority held that the presumption was justified because "early resolution of claims is of special significance in the PMPA context, and a presumption of statutory compliance facilitates that end." (Appendix to Petition, p.8a)

This is also nonsense.

Congress radically altered the preliminary injunction standard in order to keep the dealer in business while the litigation proceeds, not to have early resolutions.

The conflict in the Courts this raises is best shown by in Hilo v. Exxon Corp., 997 F.2d. 641, 643 (9th Cir. 1993):

"Our general approach to the

construction and application of the PMPA is well established. As we recently observed "the overriding purpose of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship."

Ellis v. Mobil Oil Corp. 969 F.2d 784,788 (9th Cir.1992) (quoting Slatky v. Amoco Oil Co., 830 F.2d 476, 484 (3rd Cir. en banc 1987).

In addition as remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees." Humboldt Oil Co. v. Exxon Co. USA, 695 F.2d 386, 389 (9th Cir. 1982)."

More particularly, we have recognized that "the test for a

preliminary injunction under the PMPA is more liberal than that in the general run of cases."

The Hilo Court further held:

"Preliminary relief in order to maintain the status quo may be necessary, for example, to effectuate the protection of the bona fide offer provisions in Section 2802 (b)(2)(E)(iii), despite the unquestioned good faith of the franchisor. As we explained in Ellis:

"When a franchisor decides for legitimate business reasons not to renew a relationship, the franchisor must give the franchisee a bona fide offer to purchase the station. The offer to buy at fair market value serves as a second and distinct layer

of protection, assuring the franchisee an opportunity to continue to earn a living from the property, while permitting the distributor to recover the fair market value of the property sold and to end the franchise relationship." 969 F.2d.@ 788.

The "sale" exception to the PMPA's general rule against termination or non-renewal requires the franchisor, Exxon, to prove that it either made a "bona fide" offer to sell the property the dealer at the location; or that it gave him the right to match such a "bona fide" offer made by another.

The offer is for the FRANCHISOR'S interests (feehold or leasehold) in the leased marketing PREMISES. 15 USC

1802(b)(3)(D).

The highlighted language makes two critical points. First, the term "interests in leased marketing premises" shows that what the franchisor must offer to sell on reasonable terms and conditions is its interest, be it feehold or leasehold, in the land.

PMPA, by its plain terms, does not allow a franchisor to force the franchisee to pay a business value premium.

Moreover, the statute states that the franchisor can sell only ITS interest in the premises, not the business value built up by hardworking local dealers such as Mr. Keener.

SUMMARY AND CONCLUSION

The 4th Circuit decision has powerful implications on a matter of great significance in the real world. At this moment hundreds, if not thousands of station properties are on the market.

They must be offered to the dealers in accordance with the PMPA. The PMPA places a heavy burden on franchisors that can be meet only through sound legal and economic analysis, not through judicial legislating, particularly legislating rejected by Congress.

The decision under review conflicts with the decisions at least 5 other Circuits, as well as the most recent trade regulation and antitrust decisions of this Court.

Accordingly; the SSDA believes that the writ should be granted.

Respectfully submitted;

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CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of January, 1995, I caused to be served by U.S. Mail and personal hand delivery to the 3 copies of this AMICUS BRIEF; upon the Counsel for the Petitioner and Counsel for the Respondents as follows:

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No. 94-1150

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

ALSTON R. KEENER,

*Petitioner,*

v.

EXXON COMPANY, USA, and EXXON CORPORATION,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## TABLE OF CONTENTS

Page

INTRODUCTION ..... 1

ARGUMENT ..... 2

Exxon, Rather Than Keener, Has Mischaracterized The Presumption Employed Below ..... 2

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

CASES

*Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 870 F.2d 93 (CA2 1989) (per curiam) ..... 3

*Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 699 F. Supp. 27 (E.D.N.Y. 1988) ..... 3

*Ellis v. Mobil Oil*, 969 F.2d 784 (CA9 1992) ..... 3

*Keener v. Exxon Co., USA*, 32 F.3d 127 (CA4 1994).. 3, 4, 6

STATUTES

15 U.S.C. §2802(b)(3)(D)(iii)(II) ..... 2

15 U.S.C. §2805(c) ..... 3

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## REPLY TO BRIEF IN OPPOSITION

## INTRODUCTION

In their brief in opposition, respondents (collectively "Exxon") assert that Keener has mischaracterized the presumption that the Fourth Circuit panel majority created and employed to affirm the district court's grant of summary judgment in Exxon's favor. *See* Br. in Opp. 8-9.

Keener respectfully submits this reply to demonstrate that it is Exxon, and not Keener, that has mischaracterized the presumption. The presumption as inaccurately portrayed by Exxon is contrary to the Fourth Circuit panel majority's opinion and is absurd.

Exxon has failed to argue in its brief in opposition that the presumption, as understood by Keener, does not give rise to a conflict among the circuits. Additionally, Exxon has failed to argue that the presumption, as understood by Keener, does not vitiate Congress's express presumption of oil company noncompliance with the Petroleum Marketing Practices Act and substitute the directly opposite presumption of oil company compliance.

Thus, if the Court believes that it is Keener, and not Exxon, who has accurately portrayed the presumption that the Fourth Circuit panel majority actually employed, then it is appropriate to treat this as a case in which the existence of the prerequisites for review in this Court is undisputed.

## ARGUMENT

### Exxon, Rather Than Keener, Has Mischaracterized The Presumption Employed Below

Keener explained in his petition that the Fourth Circuit panel majority created and employed the "strong presumption" that an oil company has satisfied its obligation under the PMPA to extend a "right of first refusal," *see* 15 U.S.C. §2802(b)(3)(D)(iii)(II), anytime the price term of an offer to sell the premises to the nonrenewed franchisee is the same as the price term contained in a third party's bid, even where, as here, the third party's bid

covered items in addition to the premises. *See* Pet. for Cert. 14-15.[1]

Keener also explained, *see* Pet. for Cert. 15-16, that the Fourth Circuit's presumption directly conflicts with rulings of the Second and Ninth Circuits, which have held that a valid PMPA right of first refusal must contain *both* the same price *and* the same other terms and conditions found in a third party's bid. *See Ellis v. Mobil Oil*, 969 F.2d 784 (CA9 1992); *Atlantic Ave. Oil & Gas, Ltd. v. Texaco Ref. & Mktg. Inc.*, 870 F.2d 93 (CA2 1989) (per curiam), *aff'g* 699 F. Supp. 27 (E.D.N.Y. 1988).

Attempting to dispel the existence of this circuit split, Exxon contends that Keener misunderstands the presumption that the Fourth Circuit panel majority employed to affirm the summary judgment that the district court entered in Exxon's favor. Exxon maintains that the Fourth Circuit panel majority merely created a presumption that where the "same property" is offered to a nonrenewed franchisee for the "same price" that a third party has bid, a valid PMPA right of first refusal has been

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[1] In applying the "strong presumption" of statutory compliance, the Fourth Circuit panel majority acknowledged that evidence in the record supported Keener's assertion that what DeFazio purchased for $1.2 million differed from what Exxon had offered to Keener in exchange for that price. *See Keener v. Exxon Co., USA*, 32 F.3d 127, 131 (1994); App. to Pet. for Cert. 9a. Nevertheless, the "strength" of the panel majority's judge-made presumption proved sufficient to overcome both that evidence of Exxon's statutory noncompliance and Congress's express statutory presumption, set forth in section 105(c) of the PMPA, 15 U.S.C. §2805(c), of petroleum franchisor noncompliance with the PMPA.

extended. *See* Br. in Opp. 9 ("In short, the presumption of statutory compliance adopted by the Fourth Circuit fully recognizes that there must be a 'same price, same property' right of first refusal to satisfy the requirements of the PMPA.").

It is Exxon, not Keener, that mischaracterizes the presumption that the Fourth Circuit panel majority actually employed. In its opinion, immediately following the sentence in which the panel majority first mentioned its presumption, the panel majority wrote: "This presumption that a same price offer evidences statutory compliance reflects the recognition that claims such as Keener's intrude upon normal business operations once filed." *Keener v. Exxon Co., USA*, 32 F.3d 127, 131 (CA4 1994); App. to Pet. for Cert. 8a. Thus, in the panel majority's own words, it created a "presumption that a same price offer evidences statutory compliance" with the PMPA's right of first refusal requirement. *Id.* Exxon's assertion to the contrary is wrong, and thus it is Keener who has accurately portrayed the presumption.

Judge Murnaghan, in dissent, understood the majority's presumption in exactly the same way as Keener. Judge Murnaghan wrote: "The majority avoids [reversal of the district court's judgment] by creating out of whole cloth a 'strong presumption' that, whenever two offers contain the same purchase price, a valid right of first refusal has been extended – *regardless of whether the same items were being purchased at that price.*" 32 F.3d at 133 (Murnaghan, J., dissenting) (emphasis added); App. to Pet. for Cert. 15a. Had the panel majority believed that Judge Murnaghan misunderstood the presumption, it almost certainly would have said so. But although the

panel majority and Judge Murnaghan disagreed over the advisability of such a presumption, the panel majority did not once suggest that Judge Murnaghan misunderstood or mischaracterized the actual presumption that the panel majority created and employed in affirming the grant of summary judgment against Keener. Accordingly, it is Exxon, and not Keener or Judge Murnaghan, that has inaccurately portrayed the panel majority's presumption.

Furthermore, the presumption as Exxon would have this Court understand it is absurd. It is indisputable that a valid right of first refusal under the PMPA exists where *both* the same price *and* the same other terms and conditions contained in a third party's bid are extended to the nonrenewed franchisee. An oil company that established that it extended to its nonrenewed franchisee both aspects of a valid right of first refusal would be entitled to *more* than just a *presumption* that the law had been satisfied; in such a situation, the oil company would be entitled to prevail as a matter of law.

The presumption as Exxon would have this Court understand it suffers from the same absurdity as the following statement: "In a negligence action brought in a jurisdiction where contributory negligence operates as an absolute bar to recovery, a defendant, upon establishing that the plaintiff was contributorily negligent, is entitled to a presumption that the defendant should prevail." In this hypothetical and in Exxon's misdescription of the Fourth Circuit panel majority's ruling, it is absurd to employ a presumption because, in both instances, upon establishing all aspects of an affirmative defense, the defendant would be entitled to judgment as a matter of

law.[2] Thus, the presumption as Exxon understands it is absurd.

Exxon also overlooks the panel majority's explanation that the purpose of its presumption was to make the PMPA's right of first refusal provision easier to apply. *See* 32 F.3d at 131 & n.3; App. to Pet. for Cert. 8a-9a & n.3. The presumption as Exxon misunderstands it does not make the PMPA's right of first refusal provision any easier to apply, because, to be entitled to Exxon's version of the presumption, an oil company must still prove all that the statute requires to establish an affirmative defense: that both the same price and the same other terms and conditions of a third party's bid were offered to the nonrenewed franchisee. The panel majority expressly intended to employ its presumption to lessen an oil company's evidentiary burden. The presumption as misunderstood by Exxon does not square with the majority's stated intention; however, the presumption as accurately understood by Keener and Judge Murnaghan serves the majority's intent.

Exxon does not deny that the Fourth Circuit's decision, as understood by Keener and Judge Murnaghan, involves a matter of utmost importance to thousands of petroleum franchisees, and to other holders of statutory rights of first refusal, as to which the courts of appeals

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[2] If, as Exxon claims, what Keener and Judge Murnaghan understand to be the "presumed" fact was instead a "basic" fact, then the panel majority would have had no need to create the presumption. The presumption was needed to sidestep the district court's improper factal "finding" on summary judgment that all the terms of both offers were identical.

are in conflict. Exxon also does not dispute that the Fourth Circuit's decision, as understood by Keener and Judge Murnaghan, provides an opportunity for this Court to explain that where Congress has expressly established a presumption, a court may not override Congress and establish – through an unprincipled act of judicial legislation – a directly opposite presumption.

In sum, other than by misstating to the point of absurdity the Fourth Circuit panel majority's presumption, Exxon's brief in opposition has done nothing to dispel the many persuasive reasons that Keener and his amici have placed before the Court in favor of granting review.

## CONCLUSION

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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